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Supreme Court, U.S.
FILED
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CLERK

No. 99-2047

In the

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ of Certiorari to the Supreme Court of Rhode Island

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 21, 2000
CERTIORARI GRANTED OCTOBER 10, 2000

108 pp

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

WASHINGTON, SC		SUPERIOR COURT
ANTHONY PALAZZOLO, individually and as successor in the title to SHORE GARDENS, INC.,	:	
v.	:	C.A. No. 88-0297
COASTAL RESOURCES MANAGEMENT COUNCIL, ET AL.	:	

June 15, 1988	Complaint filed in Superior Court of Rhode Island, Providence County
January 24, 1994	Complaint dismissed with prejudice pursuant to Superior Court Rule of Civil Procedure 41(b)(2)
February 22, 1994	Motion to vacate dismissal denied
March 14, 1994	Notice of appeal filed
May 1, 1995	Opinion of Supreme Court of Rhode Island reversing denial of motion to vacate and remanding case for further proceedings
October 23, 1995	Amended complaint filed

June 18-26, 1997	Non-jury trial before Judge Frank J. Williams
October 23, 1997	Transferred to Washington County
October 24, 1997	Decision of Judge Frank J. Williams denying plaintiff's request for relief and entering judgment for defendants
November 3, 1997	Judgment of dismissal entered
November 12, 1997	Notice of appeal filed
February 25, 2000	Opinion of Supreme Court of Rhode Island affirming judgment of superior court

[Executed August 2, 1983]

PLAINTIFF'S EXHIBIT 4

RHODE ISLAND COASTAL RESOURCES MANAGEMENT COUNCIL
BIOLOGIST'S FIELD REPORT

Date of Preparation: 28 July 1983

File No.: CRMC #83-3-55

Date of Application: 4 April 1983

Street: Atlantic Avenue & Shore Gardens Road

City/Town: Westerly

Owner's Name: Anthony Palazzolo

Plat No.: 155

Lot No.: 3-14,17-72,75-80

Address: 275 High Street Westerly, RI 02891

Telephone No.:

Contractor: Unknown

Address:

Telephone No.:

Names of Adjacent Waterways: Winnapaug Pond

Nearest Utility Pole #:

Project Type: to construct and maintain a wooden bulkhead; to fill behind said bulkhead and below MHW (salt marsh) to attain elevation 6.5' MHW.

* * *

12. Recommendations:

The proposal, as submitted and illustrated in project plans, is in direct conflict with the policies and regulations of the CRMC Manage-Program [sic] (Chapter 1, Section 110.0-2, Section 120.0-2). Additionally, the applicant has made no attempt to provide information to support the need or justification for the alteration sought; in fact, the alterations proposed (erosion control and shoreline improvements) have little relation to conditions of the site—erosion is not evident. The requisite burdens of proof established by the CRMC Management Program are lacking; evidence that impact will not occur has not been provided.

There is overwhelming evidence that the biological communities indigenous to this coastal wetland will be seriously and deleteriously effected by the proposed filling and bulkheading activities. Valuable wildlife habitat will be destroyed outright, habitat necessary for the survival and maintenance of the shellfish and finfish populations will be lost, and there is a very reasonable probability that a species of bird and two species of plants now listed as Species of Significance by the Natural Heritage Program will be eliminated from the area. The circulation and flushing patterns within this coastal wetland will be altered significantly; with the proposed filling and bulkheading, these patterns will be eliminated. With the type of bulkhead design proposed, there is a likelihood that sedimentation of the waters immediately offshore will occur as fine particles filter through the proposed structure or are washed directly out with each tide. With the loss or reduction of the existing habitat and food values associated with the marsh system, recreational value will be effected detrimentally—there will be a reduction or impact on the resources of the pond (shellfish, fish, etc.).

It is quite clear that the applicant has not demonstrated that there exists a "bona fide benefit to the public" to support the proposed activities and that the alterations "will not signifi-

cantly damage the biologic and/or hydrologic processes within or affecting the wetland". This coastal wetland is not capable of supporting the proposed activities without significant impact, and, for these reasons, this project should be denied.

* * *

[Executed August 10, 1983]

PLAINTIFF'S EXHIBIT 5

RHODE ISLAND COASTAL RESOURCES MANAGEMENT COUNCIL ENGINEER'S FIELD REPORT

Date of Preparation: August 5, 1983

File No.: 83-3-55

Date of Application: April 4, 1983

Street: Area between Atlantic Avenue and Winnapaug Pond

City/Town: Westerly

Owner's Name: PALAZZOLO, Anthony

Plat No.: 155

Lot No.: 3-14, 17-72,75-80

Address: 275 High Street, Westerly, RI

Telephone No.: 596-5239

Contractor: owner

Address: same

Telephone No.: same

Names of Adjacent Waterways: Winnapaug Pond and extensive associated coastal wetlands, Atlantic Barrier Beach

Nearest Utility Pole #_____

Project Type: To construct and maintain a wooden bulkhead; to fill behind bulkhead to elevation 6.5' MHW. Area to be filled is extensive salt marsh. Restore property lines and prevent erosion.

* * *

2. CORROBORATION OF APPLICATION ENGINEERING DRAWINGS (DISTANCES, ETC.):

Drawings appear very vague and inadequate. For a project of this size and nature, plans are very poor. It is understood that the applicant has spoken with other staff members about the proposal and that better plans could not be obtained from the applicant.

* * *

4. GEOLOGIC AND HYDROLOGIC CHARACTERISTICS

An extensive coastal wetlands system exists on the property. A wide strip of wetlands (700'-1000') borders Atlantic Avenue on the south and the southern shore of Winnapaug Pond on the north. Misquito [sic] ditches, in generally good condition, intermingle throughout the area and allow tidal waters to fluctuate more freely. Ponding in small pools also occurs throughout the wetlands. As well as being a natural wildlife habitat, the wetlands system acts as a buffer to flooding, absorbs runoff, and filters pollutants in run-off waters entering Winnapaug Pond.

A single dwelling exists near the shore to the west, on or adjacent to the applicant's property. A small island-like mound exists to the west with elevations of 2'- 5' MHW. A previously filled gravel road (elev. 1-'2' MHW) runs from Atlantic Avenue and terminates in a small turn-around at the shore of the pond. This turn-around is the site of some local littering and dumping. A short and narrow pebble beach is just below the turn-around area. No significant erosion we noted along the shoreline and the area is well vegetated. There is, however, shoaling along the southern shore of the pond which would make it difficult for boating in the near shore areas. Wave action on the pond is low.

The USDA "Soil Survey of Rhode Island" classifies the soils in this area as "Mk, Matunuck mucky peat," characterized

by level, poor drained soils in tidal marshes. Permeability is rapid to very rapid and water capacity is low. "The daily tidal flooding and a high salt content make this soil unsuitable for most uses except as habitat for saltwater-tolerant wildlife." The soil survey also states that this material is unsuitable for sanitary facilities and construction materials such as road fill or fill in general.

* * *

9. RECOMMENDATIONS

* * *

B) Proposal to fill property to elevation 6.5' MLW: This proposal includes the filling of approximately 18 acres of salt marsh and tidal waters. Existing soils may be used as fill.

This proposal is in direct conflict with the policies and regulations of the R.I. Coastal Resources Management Program for filling of coastal wetlands and tidal waters. Final grades and contours have not been determined. Impacts from runoff, flooding, and biological concerns have not been addressed by the applicant.

C) Proposal to prepare property for use as designated by zoning regulations. ("No sewage disposal systems are being applied for.):

This statement is very vague. Local zoning designates this area as "W1, Residential and other," but this does not mean the town would allow building in this area. Individual septic systems would be required for each dwelling constructed. There are no municipal sanitary sewers in the area. The property has been divided into approximately 70 lots. Under current R.I. Division of Land Resources Regulations, individual septic systems would most likely not be allowed. Regulation SD *15.02 Site Suitability* states, "the installation of an individual sewage disposal system is prohibited in any area where the ground

water table is within 4 feet of the *original* ground surface. . . Approval may be granted in areas where the groundwater table is within 2 to 4 feet of the original ground surface. . ." provided certain design alterations are made. The water table in this area, due to daily tidal innundation, is at or very near the surface. The above mentioned requirements for an ISDS permit must be met before the property is filled.

* * *

DEFENDANTS' EXHIBIT G

COASTAL RESOURCES MANAGEMENT COUNCIL

Re: Anthony Palazzolo
File No: 83-5-55

Thursday, August 18, 1983
Westerly Town Hall
Westerly, Rhode Island
7:30 p.m.

Council Members Present

Joseph F. Turco, Chairman

Barbara B. Colt and .

Donald C. Brown and

John D. Biafore, Esquire

Appearances

Anthony Palazzolo, pro se

Harold B. Soloveitzik, Esquire . . . . . For the Objectors

* * *

[19]

CROSS-EXAMINATION BY MR. SOLOVEITZIK

Q Mr. Palazzolo, what use are you going to make of this land after it is filled?

A Mr. Soloveitzik, I can honestly say I spent twenty years trying to get to the first stage. I haven't given serious thought to the second stage until the first stage—

Q Did you discuss—you said seventy-two lots?

A Platted as such, yeah.

[20]

Q No doubt you propose to sell those lots?

A No, Mr. Soloveitzik, you said that.

CHAIRMAN TURCO: Mr. Palazzolo, just a minute. Let him ask the question. When he's finished asking the question, you answer. If you can't, tell us. Mr. Soloveitzik, proceed.

Q What is the purpose of subdivision?

A That's the way I bought it, sir.

Q And you don't propose to sell lots off this subdivision?

A Not necessarily.

Q Do you propose to build on this property?

A Not necessarily.

Q What is the purpose of filling it, then?

A Because it's my right to do if I want to to look at it it is my business. I don't have a rash answer to answer you. You [are] putting words in my mouth.

Q This is the land, correct?

A Right.

Q You want the right to look at it, is that a correct—

A Whatever.

Q Don't you like the looks of it the way it is?

A Yeah.

* * *

PLAINTIFF'S EXHIBIT 6

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

COASTAL RESOURCES MANAGEMENT COUNCIL
60 Davis Street
Providence, R.I. 02908

Date: July 12, 1984

File Number: 83-3-55

To Whom It May Concern:

Attention is invited to the provisions of Section 42-35-15 of the Administrative Procedures Act whereby a final decision in a contested case may be subject to judicial review provided a complaint is filed in the Superior Court of Providence County within thirty (30) days after the mailing of the decision. This thirty (30) day period for the

Anthony Palazzolo, 275 High Street, Westerly, Rhode Island.

case expires on August 12, 1984.

/s/ John A. Lyons

Chairman
Coastal Resources
Management Council

STATE OF RHODE ISLAND
PROVIDENCE, SC.

COASTAL RESOURCES
MANAGEMENT COUNCIL
60 Davis Street, Providence, RI 02908

DECISION

Petition of: Anthony Palazzolo
275 High Street
Westerly, RI 02891

Docket No.: 83-3-55

Applicant, ANTHONY PALAZZOLO, applied to the Coastal Resources Management Council to construct and maintain a pile bulkhead and place fill below Mean High Water (MHW) on Lot Numbers 3 thru 14, 17 thru 22, and 75 thru 80, Plat 155 off Atlantic Avenue, Westerly Rhode Island, with specifications filed by applicant in Notes 1, 2, 3, 4, filed with the application.

A duly appointed Subcommittee held a public hearing pursuant to the Administrative Procedures Act on August 18, 1983, in the Town Hall, High Street, Westerly, Rhode Island. At that time, evidence was submitted by applicant and other interested parties. Further evidence was submitted by staff members of the Coastal Resources Management Council (CRMC) and by other State agencies, all of which was incorporated into the record. All evidence so submitted to the Council pursuant to this application whether it be by interested parties, the applicant, or the Council itself through its own staff members and other State agencies, has been made available and is available for all interested parties at the offices of the Coastal Resources Management Council, 60 Davis Street, Providence, Rhode Island.

After deliberating upon all the evidence, the Subcommittee recommended to the entire Council that the application be denied.

Thereafter, the entire Council took under consideration the record, including all evidence and the recommendations of the Subcommittee concerning this petition. After careful deliberation upon same, and after roll-call vote that the record, including all evidence therein, as well as the recommendation of the Subcommittee, was read and reviewed by members of the Council, the entire Council hereby finds:

FINDINGS OF FACT:

1. The applicant proposes to construct a wooden bulkhead type structure approximately 340' long along a portion of the southern shoreline of Winnapaug Pond. The proposed bulkhead retainer consists of a single line of horizontal poles (unknown diameter) connected to vertical poles spaced 20' apart. The vertical poles shall be dug to -4' MLW. The top of the horizontal retainers will be at existing grade (approximately 2.5' MLW).

Also, the area behind the bulkhead, approximately 18 acres of salt marsh is proposed to be filled to an approximate elevation of 6.5' MLW (5' MHW). Existing elevations of the area range from 0' -5' MHW with marsh elevations of 0' -2' MHW. Proposed embankments along property lines are to be graded to approximately 1 vert" 1 horiz. slopes. The applicant proposed to establish a 50' "buffer" upland of the proposed bulkhead. This "buffer" will consist of a 30' level area and then slope upland, 1 vert: 5 horiz. to an elevation of approximately 5' MHW. A previously filled gravel road approximately 50' x 860' runs through the eastern portion of the property. Marsh existing on both sides of this road is to be filled. According to text submitted, "the final grade and contour (of fill), may be altered slightly, to allow for surface water management."

2. An extensive coastal wetlands system exists on the property. A wide strip of wetlands (700' - 1000') borders Atlantic Avenue on the south and the southern shore of Winnapaug Pond to the north. Misquito [sic] ditches, in generally good condition, intermingle throughout the area and allow tidal

waters to fluctuate more freely. Ponding in small pools also occurs throughout the wetlands. As well as being a natural wildlife habitat, the wetlands system acts as a buffer to flooding, absorbs runoff, and filters pollutants in runoff waters entering Winnapaug Pond.

A single dwelling exists near the shore to the west, on or adjacent to the applicant's property. A small island-like mound exists to the west with elevations of 2' -5' MHW. A previously filled gravel road (elev. 1'-2' MHW) runs from Atlantic Avenue and terminates in a small turn around at the shore of the pond. This turn around is the site of some local littering and dumping. A short and narrow pebble beach is just below the turn around area. No significant erosion was noted along the shoreline and the area is well vegetated. There is, however, shoaling along the southern shore of the pond which would make it difficult for boating in the near shore areas. Wave action on the pond is low.

The USDA "Soil Survey of Rhode Island" classifies the soils in this areas as "Mk. Matunuck mucky peat," characterized by level, poorly drained soils in tidal marshes. Permeability is rapid to very rapid and water capacity is low. "The daily tidal flooding and a high salt content make this soil unsuitable for most uses except as habitat for saltwater tolerant wildlife." The soil survey also states that this material is unsuitable for sanitary facilities and construction materials such as road fill or fill in general.

3. Drawings submitted and on file at our office are vague and inadequate for a project of this size and nature. This fact was brought to applicant's attention prior to hearing and has not been addressed by applicant. As a result, the property lines are vague and not specific.

4. Applicant proposes to construct a 1340 foot pole barrier dug into shoreline embankment.

5. Proposal to fill property to elevation 6.5' MLW includes the filling of approximately 18 acres of salt marsh and tidal waters. Final grades and contours have not been determined.

6. Impacts from runoff, flooding and biological concerns have not been addressed by applicant.

7. The effect of 1340 feet of horizontal poles along the shoreline and through tidal waters and wetlands were not addressed by applicant.

8. It is apparent from staff reports that the proposed activities will have significant impacts upon the waters and wetlands of Winnapaug Pond. Such impacts were not addressed by the applicant.

9. Applicant has not demonstrated by a fair preponderance of evidence that the proposed development as submitted will not:

a. Conflict with the Federal & State approved Rhode Island Coastal Resources Management Plan.

b. Make the area unsuitable for any uses or activities to which it is allocated by a CRMC Plan or Program.

c. Significantly damage the environment of the coastal region.

Therefore, based upon the above Findings of Fact, it does not appear that the coastal resources in this immediate area are capable of supporting the proposed activity. Further, there is a complete lack of evidence demonstrating to this Council the need and demand for the proposed activity.

CONCLUSIONS OF LAW:

1. The proposed alteration and activity will conflict with the Coastal Resources Management Plan presently in effect and adopted by this Council.

2. The Coastal Resources Management Council has been granted jurisdiction over this project by reason of Title 46, Chapter 23 of the General Laws of the State of Rhode Island.

3. The applicant has not met his evidentiary burden of proof as required by enabling legislation of the Coastal Resources Management Council (46-23 GLRI) or the regulations of this Council as contained in the Coastal Resources Management Program.

Wherefore, the Council can only find that the applicant has not met his requisite burden of proof, which are clearly set forth in Rules and Regulations of this Council so mentioned above.

Therefore, as a result of these findings of fact and conclusions of law, the Council hereby denies assent of the application for the above-mentioned project.

By the Council,

/s/ John A. Lyons
JOHN A. LYONS, CHAIRMAN

/s/ Paul T. Hicks
PAUL T. HICKS,
VICE CHAIRMAN

/s/ Barbara B. Colt
BARBARA B. COLT,
SECRETARY

/s/ Carolyn F. Brassil
CAROLYN F. BRASSIL

/s/ Donald C. Brown
DONALD C. BROWN

/s/ John Rao
JOHN RAO

/s/ William Miner
DR. WILLIAM MINER

/s/ Charles Ted Wright
CHARLES TED WRIGHT

SAMUEL SNOW

/s/ Joseph Turco
JOSEPH TURCO

/s/ Chester T. Whaley, Jr.
CHESTER T. WHALEY, JR.

/s/ Malcolm Grant
MALCOLM GRANT

/s/ Edward Smith
REP. EDWARD SMITH

[Executed July 16, 1985]

PLAINTIFF'S EXHIBIT 10

RHODE ISLAND COASTAL RESOURCES MANAGEMENT COUNCIL BIOLOGIST'S FIELD REPORT

Date of Preparation: July 15, 1985

File No.: 85-1-33

Date of Application: March 21, 1985

Street: Shore Gardens off Atlantic Avenue

City/Town: WESTERLY

Owner's Name: Palazzolo, Anthony

Plat No.: 155

Lot No.: (not indicated)

Address: 275 High Street, Westerly RI 02891

Telephone No.:

Contractor/Engineer: Wes Grant III, PE (Environmental Consultants, Inc., W. Kingstown RI)

Names of Adjacent Waterways: WINNAPAUG POND

Nearest Utility Pole #: 184

Project Type: fill coastal and contiguous wetland adjacent to Winnapaug Pond with clean bank run gravel to establish a private beach club for seasonal use; there will be parking for 50 cars with boat trailers, a dumpster, port-a-johns, picnic tables, concrete barbeque pits and trash receptacles upon the filled area.

* * *

3. Significant Environmental Features (biological, hydrological, geological)

The site of approx. 12± acres of fill is entirely *in* salt marsh bordering south shores of Winnapaug Pond.

* * *

Soils of the site are surveyed Matunuck mucky peat, found in tidal marshes and subject to tidal inundation; the daily flooding and high salt content make this soil unsuitable for most uses except as a habitat for saltwater-tolerant wildlife (USDA/SCS Soil Survey of RI, 1981). There is concern as to the ability of wetland soil to sustain proposed fill of this magnitude—potential subsidence of the fill may necessitate additional filling in the future. There is question whether the fill can be contained over time, with the possibility for sedimentation to pond waters by overwash or due to scouring at the toe.

* * *

4. Existing land and water uses (note degree of development):

Land uses of Winnapaug Pond/Atlantic Beach area are moderate-to-heavy density seasonal development, residential and commercial; development directly adjacent to this site is moderate density seasonal dwellings.

* * *

[Executed July 25, 1985]

PLAINTIFF'S EXHIBIT 9

**DIVISION OF COASTAL RESOURCES—
ENGINEER'S FIELD REPORT**

TYPE OF REVIEW: P FILE NUMBER: 85-1-33

Name: Anthony Palazzolo

City/Town: Westerly

Plat: 155

Lot (s):

Mailing Address: 275 High Street, Westerly RI, 02891

Designer Address: Environmental Consultants, Inc., W. Kingstown, RI

Location Pole: Shore Gardens off Atlantic Avenue

City/Town: Westerly

Waterway: Winnapaug Pond

Barrier Beach: Atlantic Beach

Type: Developed

Proposal: To fill coastal and contiguous wetland adjacent to Winnapaug Pond with clean bank run gravel to establish a private beach club for seasonal use. There will be parking for 50 cars with boat trailers, a dumpster, port-a-johns, picnic tables, barbeque pits of concrete and other trash recepticles [sic] upon the filled area. (This application requires a special exception under RICRMP Section 130.

* * *

Distance of Proposal to Coastal Feature and Elevations of Proposal: The max. elev. of the proposed 34,200 cu. yd± fill (11.4 ac±) is indicated to be +3.5' MSL, extending to within 50' of mean low water.

* * *

Engineering Comments

The highly compressible nature of mucky peat (among other poor engineering characteristics) makes this soil complex undesirable for a parking area/roadway base, as there exists the potential for excessive settlement over time. (Possibly requiring additional filling). The R.I. soil survey notes a "poor" rating of Matunuck peat as roadfill (noting wetness). Also, storm surge flooding and recession would cause major sedimentation within the pond.

Presently sediment, transported through the stabilized inlet, is accumulating along the southern shore of the pond as indicated by the increasing size of the flood tidal deltas and decreasing depths. (Boat navigation may be hindered by this condition.) The proposed fill extends to within 50' of MLW. The toe of the proposed, 1:6 sloped embankment is actually at MHW. Even with the proposed conservation mix vegetative cover stabilizing the slope, the close proximity of the toe to the pond may cause sedimentation, erosion, and toe scouring from storm waves and tidal surges.

* * *

PLAINTIFF'S EXHIBIT 11

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

COASTAL RESOURCES MANAGEMENT COUNCIL
60 Davis Street
Providence, R.I. 02908

DATE: March 3, 1986

FILE NUMBER: 85-1-33

To Whom It May Concern:

Attention is invited to the provisions of Section 42-35-15 of the Administrative Procedures Act whereby a final decision in a contested case may be subject to judicial review provided a complaint is filed in the Superior Court of Providence County within thirty (30) days after the mailing of the decision. This thirty (30) day period for the

Anthony Palazzolo

case expires on April 3, 1986.

/s/ William W. Miner

Chairman
Coastal Resources
Management Council

STATE OF RHODE ISLAND
PROVIDENCE, SC.

COASTAL RESOURCES
MANAGEMENT COUNCIL
60 Davis Street, Providence, RI 02908

DECISION

Petition of: Anthony Palazzolo
Docket No.: 85-1-33

Applicant, Anthony Palazzolo filed with the Coastal Resources Management Council an application to fill a contiguous wetland adjacent to Winnapaug Pond with clean, bank run gravel to establish a private beach club for seasonal use. The application indicated parking for 50 cars with boat trailers, a dumpster, port-a-johns, picnic tables, barbeque pits of concrete, and other trash receptacles would be placed upon the filled area.

The site location is at Shore Gardens off Atlantic Avenue, Westerly, Rhode Island. Applicant applied for a special exception under Section 130 of the Rhode Island Coastal Resources Management Plan.

A duly appointed Subcommittee held a public hearing on this application, pursuant to the Administrative Procedures Act, on July 30, 1985 in the Council Chambers, Town Hall, High Street, Westerly, Rhode Island. At that time evidence was submitted on behalf of the applicant, as well as other interested parties. Evidence was submitted at this hearing on behalf of the Coastal Resources Management Council though various State Agencies and staff members. Further, all evidence so submitted to the Subcommittee pursuant to this application, whether it be by interested parties, proponents or the Coastal Resources Management Council itself through its staff members and other various State Agencies, has been and is available to all interested parties at the offices of the Coastal Resources Management Council, 60 Davis Street, Providence, Rhode Island, 02908.

After deliberation upon all the evidence submitted and the entire record, the Subcommittee recommended to the full Council to deny the application.

Thereafter, at a meeting held on November 26, 1985 at the Cannon Building, Providence, Rhode Island, the entire Council took under consideration the record, the evidence therein, and the recommendation of the Subcommittee. The entire Council then heard further testimony from the applicant.

After careful deliberation upon the same and after a roll call vote that all the evidence, record and recommendations of the Subcommittee so submitted were read by members of the Council, the entire Council hereby finds:

FINDINGS OF FACT:

1. The base flood elevation of the area is 15' MSL. The area is in a V Flood Zone.

2. The proposed construction will take place in an extensive coastal wetland system 700' to 1.000' wide, bordering the southe[n] shore of Winnapaug Pond. Existing elevations in the area range from 0-5' MHW with marsh elevations of 0-2' MHW. A previously filled gravel road runs through the eastern portion of the property. The area is adjacent to a large microtidal coastal lagoon complex with extensive salt marsh fring[e] of variable width. The pond is flushed by narrow and shallow stabilized tidal inlet and normal tide range is 2.6' + 1.2' moontide surge. The adjacent tidal marsh is subject to tidal inundation daily.

3. The project proposes extensive filling of the area, including coastal wetlands. The highly compressible nature of mucky peat makes this soil complex undesirable for parking or roadway base. The Rhode Island Soil Survey for the area notes a Poor Rating. Additionally, storm surge flooding and recession would cause major sedimentation within the Pond.

4. There is presently sediment transported through the stabilized inlet, which is accumulating along the shouther [sic] shore of the Pond as indicated by the increasing size of the flood tidal deltas and decreasing depths. The proposed fill extends to within 50' of MLW. The toe of the proposal, 1:6 sloped embankment, is actually at MHW. Even with the proposed conservation mix vegetative cover stabilizing the slope, the close proximity of the tow to the pond would cause sedimentation, erosion and toe scouring from storm waves and tidal surges.

5. The marsh which would be filled under this proposal presently provides refuge and feeding areas for larval and juvenile finfish and shellfish and for migratory waterfowl and wading birds. Additionally, mosquito ditching enhances edge through the high marsh area, enabling access of auna [sic] to cover areas and permits the exchange of nutrient/waste products.

6. Filling of the marsh would destroy the natural shoreline protection, decrease sediment trapping and accretion, decrease flood storage, eliminate or greatly reduce nutrient retention in the area.

7. The proposed project is in conflict with the following criteria of the CRMP:

Sect. 130(A)(1):	The proposal must meet the criteria for a Special Exception, whereby the activity servcs "a compelling public purpose providing benefits to the public as a whole as opposed to individual or private interests."
Sect. 150:	The applicant has proposed a 50-foot "buffer" from the water's edge to the edge of fill. To establish a "buffer" in this case is technically irrelevant in that the salt marsh (coastal feature) itself is proposed to be filled.

Sect. 210.3(C)(1): "The Council's goal is to preserve, and where possible, restore coastal wetlands."

Sect. 210.3(C)(4): "Alterations to salt marshes . . . abutting Type 2 waters are prohibited except for minor disturbances associated with . . . residential docks and walkways . . . and . . . approved construction or repair of structural shoreline protection facilities."

Sect. 300.2(B)(1): ". . . unless the primary purpose of the alteration is to preserve or enhance the feature as a conservation area or buffer against storms filling . . . is prohibited on . . . coastal wetlands . . . adjacent to Type 1 and 2 waters."

Sect. 300.2(B)(2): "Filling . . . on coastal wetlands is prohibited adjacent to Type 1 and 2 waters . . . unless a consequence of an approved mosquito control project."

Sect. 330(A)(1): "The primary goal of all Council efforts to preserve, protect and, where possible, restore the scenic value of the coastal region is to retain visual diversity and often unique visual character of the Rhode Island coast . . ."

WHEREFORE, as a result of these Findings of Fact, it appears that the proposed activity will detrimentally impact the coastal resources of this State.

CONCLUSION OF LAW:

1. This Council has been granted jurisdiction over the above-mentioned project by reason of Title 46, Chapter 23 of the General Laws of the State of Rhode Island, as amended.

2. The proposed alteration will conflict with the management plan approved adn [sic] adopted by this Council and presently in effect.

3. The records reflect that the evidentiary burdens of proof as set forth in the Coastal Resources Management Council Program have not been met for this project.

As a result of these Findings of Fact and Conclusion of Law, the Council hereby denies approval to the applicant to undertake the activities contained in the application.

For the Council,

/s/ William Miner
DR. WILLIAM MINER
Chairman

DATED: Feb. 18, 1986

/s/ David Abedon
DAVID ABEDON

/s/ Joseph Nichols
JOSEPH NICHOLS

/s/ Donald C. Brown
DONALD C. BROWN

/s/ George Caruolo
REP. GEORGE CARUOLO

SEN. WILLIAM C. O'NEILL

/s/ Malcolm Grant
MALCOLM GRANT

/s/ George L. Sisson, Jr.
GEORGE L. SISSON, JR.

/s/ Paul T. Hicks
PAUL T. HICKS

/s/ John A. Lyons
JOHN A. LYONS

/s/ Kathryn G. Owen
KATHRYN G. OWEN

SAMUEL SNOW

/s/ Joseph F. Turco
JOSEPH F. TURCO

CHARLES TED WRIGHT

[Filed January 5, 1995]

DEFENDANTS' EXHIBIT III

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

PROVIDENCE, SC. SUPERIOR COURT

ANTHONY PALAZZOLO, :
PLAINTIFF :

V. : C.A. No. 86-1496
:

COASTAL RESOURCES
MANAGEMENT COUNCIL, :
DEFENDANT

DECISION

ISRAEL, J. In this civil action the plaintiff, Anthony Palazzolo, appeals under *G.L. 1956 (1993 Reenactment) § 42-35-15* from a decision of the defendant, Coastal Resources Management Council (CRMC), issued on February 18, 1986, in which the CRMC denied the plaintiff's application to fill a contiguous wetland adjacent to Winnapaug Pond with clean, bank-run gravel to establish a private beach club for seasonal use. The plaintiff's complaint was filed on April 3, 1986. Although the record appears to have been certified to this Court from the CRMC on June 6, 1986, it has since been lost or misplaced. The Court relies for this Decision on so much of the record as is disclosed by the parties in their respective memoranda. In

addition, each of the parties has furnished the Court with such copies of the record as they have in their own respective files.

On March 11, 1993 the plaintiff attempted to withdraw his appeal from the decision of the CRMC "without prejudice to his right to file a new application or proceed with a petition for assessment of damages for inverse condemnation or other compensation under the Constitution of the United States and the Constitution of the State of Rhode Island." The plaintiff appears, however, to have changed his mind, because a briefing schedule was ordered on June 9, 1993. The case was assigned for decision to this Justice on August 11, 1994, but briefing was not finally concluded until October 17, 1994.

There is also pending in the Supreme Court an appeal from the dismissal by the Court under Rule 41(b) of an action in Washington County Superior Court, in which the plaintiff sought to have damages assessed for the inverse condemnation of this land. The motion to dismiss for lack of diligent prosecution and failure comply with the Rules of Civil Procedure and/or orders of the court was granted on January 24, 1994. In that action, filed in June 1988, the plaintiff had joined the CRMC, alleging that its denial of the application, which is the subject of this appeal, constituted part of the deprivation of all beneficial use of his property through strict enforcement of regulations, for which he is entitled to compensation. It is not entirely clear whether the plaintiff perceived an inter-relationship between this action and the Washington County action.

I.

The plaintiff apparently has owned a parcel of land since the early 1960's in the Town of Westerly north of Atlantic Avenue and bordering on the southerly shore of Winnapaug Pond. He applied for the assent of the CRMC early in 1985 to permit him to fill approximately 11.4 acres with approximately 34,200 cubic yards of bank-run gravel. The filling is necessary to create a private beach club to provide a private area for

swimming, picnicking, shellfishing and boating without the erection of any structures on the property. The owner proposed to locate a dumpster on the site from May 1 through October 31, as well as a number of smaller trash barrels at various locations on the property. There would also be parking for fifty cars with boat-trailers, "port-a-johns," picnic tables and concrete barbecue pits on the premises.

The entire land area is part of a statutory coastal wetland. The owner and his engineer proposed in the application to minimize environmental impact by not placing any fill in a fifty-foot "buffer" zone at the shoreline, by grading the slope of the fill from the set-back at a 1' to 6' rise, and by seeding the slope with Soil Conservation Seed grass seed as soon as the filling was accomplished. It was also proposed to control overland drainage of the fill area, itself, by the use of bank-run gravel fill and by contouring the fill inland toward a processed stone filtering bed in the interior of the land area. The owner's engineer claimed that the filling of this area would allow an increased enjoyment of recreational boating, fishing and swimming. He conceded, however, that filling this marshland would have "somewhat of an impact upon the biological communities that exist there now. . ."

The plaintiff's application drew prompt objection from the Town Engineer and the Conservation Commission of the Town of Westerly. The CRMC's staff engineer reported that the proposed alteration to the wetland presented a "significant potential for increased impacts to the pond ecosystem." A qualified biologist reported to the CRMC that the proposal represented "a *direct* loss of salt marsh and its inherent values." (Emphasis in original.) She also described a great number of potential indirect impacts. The proposal also drew objection from the administrator of the Statewide Planning Program and the State Division of Fish and Wildlife.

A sub-committee of the CRMC held a public hearing on July 30, 1985. At that hearing the sub-committee received the negative reports of the staff engineer and the biologist in evidence in the record. The adverse report of the Statewide Planning Program, a favorable report of the Historical Preservation Commission, and the negative report from the State Division of Fish and Wildlife were also received in evidence. The applicant testified in his own behalf and presented testimony from the engineer who assisted in the preparation of his plans. The engineer testified that filling the area was necessary to allow people to park vehicles on the property. He pointed out that people were presently illegally using a private way across the plaintiff's land to gain access to the pond. He acknowledged that the proposal would have an environmental impact on the area. He also acknowledged that there were other public and private accesses to the pond. The only use for the land which would completely reduce environmental impact, according to this witness, would be to leave it in its present state. He had no objection to the reports of the staff engineer and biologist, except that he thought that a layer of stable ground might underlie the surface layer of Matunuck mucky peat, which consists of six to eighteen inches of surpressable [sic] land. The sub-committee heard from some interested members of the public, none of whom favored granting the application. The sub-committee recommended that the CRMC find certain facts and that the application be denied.

On November 26, 1985 the matter came before the CRMC at a regular meeting. The plaintiff was granted leave to present the testimony of Irene H. Stuckey, whose qualification as an expert in the field of environmental plant physiology was unquestioned. She gave it as her opinion that the plaintiff's land is "an extremely valuable salt marsh and should be preserved." She testified that any further filling of the marsh of which the plaintiff's property is a part should be stopped. In her written report, which was received in evidence, she described the marsh

as "extremely valuable in terms of plant species that grow there, and as a habitat for birds." Further, "it is one of the more valuable tidal salt marshes in Rhode Island." The CRMC voted to approve the sub-committee's recommendation that the application be denied. The decision of February 18, 1986 ensued.

In his memorandum the plaintiff contends that the decision of the CRMC was arbitrary, capricious and characterized by an abuse of discretion or a clearly unwarranted exercise of discretion (*§42-35-15(g)(6)*) and was an unconstitutional taking of private property for public use in violation of the Constitutions of the United States and the State of Rhode Island (*§42-35-15(g)(1)*).

II.

As to the first ground, the plaintiff first argues that the CRMC is collaterally estopped from making the following findings of fact:

> "5. The marsh which would be filled under this proposal *presently* provides refuge and feeding areas for larval and juvenile finfish and shellfish and for migratory waterfowl and wading birds. Additionally, mosquito ditching enhances [s]edge through the high marsh area, enabling access of [f]auna to cover areas and permits the exchange of nutrient/waste products."
>
> "6. Filling of the marsh would destroy the natural shore line protection, decrease sediment trapping and accretion, decrease flood storage, eliminate or greatly reduce nutrient retention in the area."

He points to what he claims to be a decision of the Chief of the Division of harbors and rivers in the Department of Natural Resources issued on April 1, 1971. In that decision the Chief of the Division purported to grant the plaintiff's 1963 appli-

cation to dredge channels in Winnapaug Pond and to deposit dredged materials on his waterfront land. The Chief found:

> "(6) We find that neither application No. 2 (the 1963 application) nor No. 3 (a substantially similar 1966 application) will have any significant effect on wildlife."

According to the plaintiff's testimony at the public hearing on July 30, 1985, the assent issued pursuant to this purported decision was withdrawn without explanation in the record seventeen days after its issuance. No further action was taken by the plaintiff on this application and the purported, but obviously revoked, decision of the Chief of the Division of harbors and rivers. Nor did the plaintiff make any further explanation on the record of his subsequent proceedings, if any, with regard to this decision and assent.

It is important to note that the 1971 decision and assent were obviously known to and in the possession of the plaintiff at the time of the sub-committee hearing on July 30, 1985 and at the hearing before the full CRMC on November 26, 1985. Nevertheless, he deliberately chose not to produce them, or any other available documentation regarding his 1963 and 1966 applications and their subsequent litigation history. The CRMC was led to believe in 1985 that all the plaintiff expected it to decide was whether or not he was then entitled to special exceptions from the strict requirements of the Coastal Resources Management Program (CRMP) on the basis of the record presented at the hearing. Since the plaintiff was fully aware at that time of the prior findings, which he now seeks to interpose to estop contrary fact-finding by the CRMC, he must be deemed to have waived any possible factual benefit from the 1971 findings. He surely is not claiming now that he wanted to mislead the CRMC or that his failure is due to oversight. After all, he did mention those earlier proceedings in another context at the sub-committee hearing.

It is not necessary in this case to reach the question of whether or not the doctrine of collateral estoppel bars the CRMC from finding the facts it did. Nor need the Court decide whether the decision of the CRMC depends on the facts which the plaintiff claims it is estopped from finding. Two reasons mandate this conclusion.

First, under *§42-35-15* this Court reviews the agency's fact-finding on the basis of the record before the agency. It is the sufficiency of the evidence in the record to support the facts found by the agency which is tested judicially on administrative appeal. *Easton's Point Association, Inc. v. Coastal Resources Management Council*, 559 A.2d 633, 636 (R.I. 1989). Second, the rule that issues not raised before a hearing tribunal will not be reviewed on appeal is especially pertinent when an appellant attempts to raise estoppel issues for the first time on appeal. *See Gross v. Glazier*, 495 A.2d 672, 675 (R.I. 1985). In addition, the Court agrees that a doctrine of collateral estoppel may be applied only with great caution to administrative proceedings for the reasons set forth in CRMC's supplemental memorandum, referring to *Restatement of Judgments, Second* (1982). §83 and comments. Accordingly, the defendant's motion to strike portions of the plaintiff's memorandum is moot, since the Court rules that the issue is not properly raised in this proceeding.

The plaintiff next argues that the CRMC decision was an arbitrary and capricious abuse of discretion because he had established that he had met all the standards for a special exception to the criteria established in the CRMP. Section 130A of the pertinent version of the CRMP provides as follows:

> "A. Special exceptions may be granted to prohibited activities to permit alterations and activities that do not conform with a Council goal for the areas affected or which would otherwise be prohibited by the

requirements of this document only if and when the applicant has demonstrated that:

(1) The proposed activity serves a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests. The activity must be one or more of the following: (a) an activity associated with public infrastructure such as utility, energy, communications, transportation facilities; (b) a water-dependent activity that generates substantial economic gain to the state; and/or (c) an activity that provides access to the shore for broad segments of the public.

(2) All reasonable steps shall be taken to minimize environmental impacts and/or use conflict.

(3) There is no reasonable alternative means of, or location for, serving the compelling public purpose cited."

The CRMC concluded that the plaintiff had failed to satisfy his burden of proof on the record that he satisfied all the conditions necessary to warrant its exercise of discretion to grant a special exception.

The plaintiff contends that his proposal to fill more than eleven acres of coastal wetlands in order to develop a private beach club serves a *compelling* public purpose which provides benefits to the public as a whole. He says that his beach club would be an activity that provides access to the shore for *broad segments of the public*. He further says that there is *no reasonable alternative* means of, or location for serving that compelling public purpose.

The evidence in the record is clear that the public already has abundant access to Winnapaug Pond, including some access over a private way across the plaintiff's land to a boat ramp in its present condition. The CRMC was fully justified in finding

that there was nothing compelling about the public purpose the plaintiff sought to serve. In addition, nothing in the record tends to show that the plaintiff's private beach would provide access to the shore for broad, as opposed to narrow, segments of the public. Finally, the record does not support the conclusion that there is no reasonable alternative to the plaintiff's proposal to serve the purpose he contends to be public. The plaintiff does not show that the public purpose he claims to serve cannot be served by selective development of his land without covering more than eleven acres of a valuable salt water marsh with gravel fill.

In the final analysis, however, this Court is not permitted to substitute its conclusions of fact for those of the agency, where they are derived from the presence or lack of supporting evidence in the record. *Environmental Scientific Corp. v. Durfee*, 621 A.2d 200, 208 (R.I. 1993). The granting of a special exception under Section 130 of the CRMP is an exercise of discretion by the CRMC. In the exercise of that discretion the CRMC is called upon to balance the adverse impact of a proposed activity upon the goals and policies of the CRMC against the public interest served by the activity. *General Laws 1956 (1991 Reenactment) § 46-23-1(a)* provides in part ". . . that preservation and restoration of ecological systems shall be the *primary* guiding principal upon which environmental alteration of coastal resources will be measured, judged and regulated." The CRMC is thereby mandated to give environmental concerns primacy over all other considerations, including even activities serving the compelling purposes described in Section 130. The economic consequences of such a mandate are the subject of the next contention of the plaintiff.

The CRMC's decision to deny this application was neither arbitrary nor capricious, nor was it an abuse of discretion. It was based on the plain weight of the evidence before it that the plaintiff's proposed activity served no compelling public purpose.

III.

As a second ground for reversal of the CRMC decision the plaintiff alleges that he is deprived by that decision of all beneficial use of his property without any compensation in violation of the Constitutions of the United States and the State of Rhode Island. The plaintiff is clearly wrong. If he has in fact been deprived of all beneficial use of his land by the strict enforcement of the CRMP policies without the benefit of the special exceptions he has requested, he may in an appropriate action recover damages for inverse condemnation. *Milardo v. Coastal Resources Management Council*, 434 A.2d 266, 270 (R.I. 1981). *See also*, *Santini v. Lyons*, 448 A.2d 124, 129 (R.I. 1982).

An appeal from the decision of an administrative agency is not an appropriate action in which to determine whether the enforcement of an administrative regulation, from which a particular exception is sought, constitutes a deprivation of all beneficial use of a claimant's property. All that can be decided in this proceeding is that this refusal to grant this particular exception to these policies regarding the filling of coastal wetlands was justified on the record presented.

Even granting that the plaintiff here may have made a showing that there is no permitted use of his land under the CRMP from which he can derive any economic benefit, that showing was totally irrelevant to any issue for decision before the CRMC. Counsel for the plaintiff conceded as much in colloquy with the sub-committee in July 1985, after the plaintiff was permitted to testify over objection that he had offered to sell his land to the State, when he said: "I'm not asking you to take the checkbook out at this time." Since the evidence was irrelevant, the State had no appropriate opportunity or motive to contradict or rebut it. Although the plaintiff's witnesses were allowed to testify that any development at all of the plaintiff's land would adversely impact the environment, none of them

testified that no economically feasible activity could be the subject of a special exception. While it was Dr. Stuckey's opinion that no further filling of the marsh *should be* permitted, she could not testify that none *would be* permitted by the CRMC, if its impact was appropriately minimized or mitigated. In an appropriate timely action the State would be permitted to contradict or rebut the plaintiff's evidence, if it could.

It is true that the original complaint filed in this case on April 3, 1986 did allege generally that the denial of his application constituted an unconstitutional taking for which he did not receive compensation in violation of his constitutional rights. Among his prayers for relief he did seek an adjudication that the CRMC "acted in violation of the plaintiff's constitutional rights." The prayers for relief also claim money damages. Nevertheless, only the utmost liberality in the construction of pleadings would allow a Court or a party to guess that the plaintiff was seeking damages for inverse condemnation under the doctrine advanced in *Annicelli v. Town of South Kingstown*, 463 A.2d 133, 139 (R.I. 1983). The record of this disorganized litigation does not disclose that the defendant ever answered the plaintiff's complaint, but the parties have always, until the plaintiff filed his memorandum on March 8, 1994, regarded this action as an administrative appeal and not a claim for damages for inverse condemnation.

Whether or not that claim was any more or less unambiguously raised in the Washington County case now on appeal in the Supreme Court is beside the point. The parties have consistently treated this action as a pure administrative appeal calling only for a judicial review of the CRMC decision on the statutory grounds provided in *§42-35-15(g)*. It is far too late in this litigation to bring in the State, itself, as a defendant to afford the attorney general an opportunity to represent and defend the General Treasury against the plaintiff's claim for money damages. It may well be that the pending Washington County case

is the last fragile reed upon which the merits of the plaintiff's claim now cling.

As for this action, a judgment will enter for the defendant denying and dismissing the plaintiffs' complaint. The defendant will present a form of judgment for entry on notice to the plaintiff.

[Filed October 23, 1995]

[Caption omitted in printing]

AMENDED COMPLAINT

1. Plaintiff, Anthony Palazzolo ("Palazzolo") is a resident of the Town of Westerly, County of Washington and State of Rhode Island.

2. Defendant, Coastal Resources Management Council (CRMC) is an Authority created as an Agency of the State of Rhode Island by Act of the General Assembly (Public Laws of 1971, Chapter 279). The State is named as CRMC is without capacity to be financially liable for the acts complained of herein.

3. Palazzolo is, and has been the owner, in fee simple absolute of a parcel of real estate (the "Property") located in Westerly, Rhode Island in the vicinity of Winnapaug Pond.

4. In 1960, a sub-division in the Misquamicut area of Westerly, Rhode Island was created. In 1961, Palazzolo purchased a total of eighty lots, six of which were later sold. The Property is properly subdivided and recorded and each lot has been separately taxed for the entire time during which Palazzolo has owned the property.

5. In 1962, Palazzolo applied to the Department of Environmental Management's predecessor agency, the Department of Natural Resources, Division of Harbors and Rivers (the "Division of harbors [sic] and Rivers") for authorization to dredge 60,000 cubic yards of material in Winnapaug Pond (the "1962 Application"). The Division of Harbors and Rivers declined to render a decision.

6. On May 16, 1963, a second application was submitted with revised plans (the "1963 Application"). The Division

of Harbors and Rivers again deferred a decision on the Application.

7. On April 29, 1966, Palazzolo submitted a third application to perform the necessary grading and dredging of the pond area in front of his property to develop and maintain a swimming area (the "1966 Application"). This, too, was denied.

8. In August of 1966, Palazzolo filed a Complaint in Providence County Superior Court appealing the denial of the 1966 Application of the Division of Harbors and Rivers. Because the administrative record was insufficient for the purposes of judicial review, the case was remanded for hearing and findings of fact.

9. On or about April 1, 1971, upon re-hearing, the Division of Harbors and Rivers *approved* the 1963 and 1966 Applications and instructed Palazzolo to advise within sixty (60) days as to which plan he intended to adopt.

10. Palazzolo complied with the terms of the approval and advised the Division of Harbors and Rivers that he wished to adopt his second plan dated May 16, 1963, the 1963 Application. Although his applications had been approved, several months would pass before the Division of Harbors and Rivers issued its formal Assent. Inexplicably, without comment, the Division withdrew its approval seventeen days after issuing its Assent.

11. On or about June 15, 1985, Palazzolo submitted to the Council his fifth and last application (the "1985 Application") to put his property to some beneficial use. The 1985 Application was designed to minimize the impact on the environment and proposed far less development than that proposed in Palazzolo's earlier applications. Palazzolo's application proposed to fill a contiguous wetland adjacent to Winnapaug

Pond with clean, bank run gravel to establish a beach club for seasonal use only.

12. The Council voted to deny Palazzolo's 1985 Application. The decision was based, *inter alia*, on the Council's belief that Palazzolo's property provided "refuge and feeding areas for larval and juvenile finfish and shellfish and for migratory waterfowl and wading binds [sic]."

13. The Plaintiff has exhausted all available administrative remedies as provided by R.I. Gen. Laws § 42-35-1 *et seq.*

COUNT I
(INVERSE CONDEMNATION)

14. Plaintiff reincorporates paragraphs 1 through 13 as if fully realleged herein.

15. As a result of the CRMC's denial of Palazzolo's right to develop the property, Plaintiff has been denied economically, beneficial use of his property from the time it was purchased in1962, to the time this suit was instituted and *in futuro.*

16. But for the CRMC's prohibition on development of the property, the Plaintiff would have been able to develop his property as planned and such development was within the ownership rights of the Plaintiff.

17. As a direct and proximate result of the Defendants' refusal to allow any development of the property, there has been a taking of private property for public use without just compensation.

18. The Defendants' acts, and the resultant denial of economically beneficial use of the Plaintiff's property without compensation, is in violation of the Fifth Amendment of the United States Constitution and Article 1, Section Sixteen of the Rhode Island Constitution.

WHEREFORE, the Plaintiff respectfully asks that this Court:

1. Award Plaintiff any and all damages suffered as a result of the taking of their property as alleged herein;

2. Alternatively, award Plaintiff the Fair Market Value of their property as damages for the taking as alleged herein;

3. Award Plaintiff interest on such damages from the date of taking;

4. Award Plaintiff attorneys' fees and costs pursuant to 42 U.S.C. Sec.s [sic] 1983 and 1988; and

5. Grant other relief as this Court deems just.

Respectfully submitted,
Anthony Palazzolo
By his Attorneys,

/s/ John B. Webster
JOHN B. WEBSTER (#3586)
RESNICK, CAFFREY
& WEBSTER
300 Centerville Road
Suite 300 Summit West
Warwick, Rhode Island 02886
Tel: 401-738-4500
Fax: 401-738-5892
Date: [10/20/95]

[Served September 3, 1996]

[Caption omitted in printing]

PLAINTIFF'S ANSWERS TO DEFENDANT STATE OF RHODE ISLAND'S INTERROGATORIES TO PLAINTIFF

* * *

6. State, in your opinion, the total value of the land you claim was taken together with all abutting land owned by you at each of the following times: (a) immediately before the time of the alleged taking; (b) immediately after the time of the alleged taking.

Answer:
Approximately $9,000,000 immediately before the taking and $25,000 immediately after the taking. The Plaintiff refuses to include the value of "abutting land."

* * *

8. a) State and itemize the total amount of just compensation you allege is due for the alleged taking.

Answer:
Eighty lots with a fair market value of (averaged) of [sic] $112,000 less $10,000 for each lot in development costs.

b) If you seek any additional amounts of money in this action, itemize and explain.

Answer:
Interest on the taking from March 5, 1986 approximately $9,072,000 plus legal fees which will be itemized and submitted at the appropriate time.

* * *

[Served June 14, 1997]

[Caption omitted in printing]

PLAINTIFF'S SUPPLEMENTAL ANSWERS TO DEFENDANT STATE OF RHODE ISLAND'S INTERROGATORIES

* * *

6. State, in your opinion, the total value of the land you claim was taken together with all abutting land owned by you at each of the following times: (a) immediately before the time of the alleged taking; (b) immediately after the time of the alleged taking.

Answer:
Value of land: $125,000 per lot prior to taking; [n]one or nominal value after the taking.

8. a) State and itemize the total amount of just compensation you allege is due for the alleged taking.

Answer:

125,000 per lot -	9,250,000.00
25,000 development	1,850,000.00
	7,400,000.00
Interest	9,768,000.00
Total	17,168,000.00

* * *

[Taken June 20, 1997]

DEFENDANTS' EXHIBIT W

[Caption omitted in printing]

Deposition of RUSSELL J. CHATEAUNEUF taken on behalf of the Defendants on Friday, June 20, 1997, at the offices of Goldman & Biafore, 101 Dyer Street, Providence, Rhode Island, commencing at 12:15 P.M. before Rebecca J. Harrison, Notary Public

APPEARANCES

John B. Webster, Esquire ..... For the Plaintiff

Goldman & Biafore
By: Brian Goldman, Esquire ..... For the Defendant (CRMC)

Department of Attorney General
By: Michael Rubin, Esquire ..... For the Defendant (State of R.I.)

* * *

[3]

RUSSELL J. CHATEAUNEUF,
C-H-A-T-E-A-U-N-E-U-F, having been duly sworn by Notary Public, testifies as follows:

EXAMINATION BY MR. RUBIN

* * *

[9]

Q Am I correct in describing that this plat depicts a number of individual lots on the south side of Winnapaug Pond, north of Atlantic Avenue?

A Yes.

Q Okay. And have you gave any consideration to—

MR. RUBIN: Strike that.

Q If an individual were to develop this subdivision as depicted on this plat and were to do so in the time period of roughly 1983 and the individual were to comply with the law, the individual would have had to go to what was then the ISDS section of DEM, correct?

A That's correct.

Q Which is the function you now supervise?

A That's correct.

Q And what would that individual have to have done?

A The individual would have had to have complied with Section 18, S.D. 18 of the rules concerning subdivision suitability approval.

[10]

Q Would it help you to refer to the rules?

A Sure.

Q Okay. And the rules that you're referring to are the regulations that we've discussed earlier in this deposition?

A Yes.

Q Okay. And what would such compliance have entailed?

A Well, they would have been required to submit an application in accordance with that section of the rules, Section 18, via topographic map of details of the lots proposed, percolation testing, ground watertable testing and an indication of the location of wetlands, and certain certifications, and, if necessary, also assessment on environmental impacts.

Q Okay. And in order to go forward with actual construction, he would have to have obtained from that section what?

A He would have had to have obtained a subdivision suitability determination from the Department that indicated that the lots were suitable for sewage disposal.

Q Okay. And how about with respect to the [11] construction of any one particular individual system?

A In order to actually construct the ISDS system on any lot, they would first have to obtain an individual lot approval for that individual sewage disposal system prior to installation.

Q And what criteria and factors would that have entailed?

A It would have entailed all of the items indicated in Section S.D. 2.02 of the rules concerning application for approval of a new sewage disposal system. The general types of information that must be submitted for that application is a plan showing the property lines, the topography of the land, any nearby wells, drinking water wells and wetlands, the locations of testing work on the soils, which is necessary to determine the soil type, and the watertable depth, it would indicate the approximate location of the home, or that dwelling proposed, and various details on the septic system design pursuant to the rules.

Q So, if I understand you correctly, in order to proceed the actual construction of septic systems on the individual lots that are shown on the plat [12] that you have in front of you, which is a Shore Gardens plat of 1959, you would, essentially, have to get two approvals, or would have had to get two approvals at that time, one being a subdivision suitability approval, the other being an individual design approval; is that correct?

A That's generally correct. You mean if the petitioner wanted to build one house and presented a plan and said I only want to build one house, they could forego the subdivision suitability process and go right to the design phase for the individual sewage, for the single individual sewage disposal system, that is an option.

Q Understood. So with respect to developing a subdivision of this sort, and let us suppose that there were 74 available lots on the subdivision plan before you, being the Shore Gardens subdivision, one would essentially have to successfully complete that, get 75 approvals, one being the overall subdivision suitability determination, and then 74 individual approvals?

A That's correct, in order to build on 70—ISDS systems on 74 individual lots, yes.

[13]

Q Okay. And generally, if one, if a petitioner or applicant intended to develop more than one individual lot in the subdivision within a time frame of several years, such applicant would find it efficient to get the suitability determination first; isn't that correct?

A That's correct.

Q What would happen if a petitioner or applicant were to attempt to develop a subdivision of the sort presented by

the Shore Gardens plat in 1959 one lot at a time, bypassing the subdivision suitability determination?

THE WITNESS: May I refer to the rule?

MR. RUBIN: Yes, please do.

A In answering that question, I'm going to point you to the definition of subdividing as contained in the rules, Section S.D. 1.31, which defines subdivision of a piece of property for the purposes of these regulations "shall be held to mean the division of a lot, tract or parcel of land to three or more lots, sites or other division of land for the purpose, whether immediate or future of building development, or three or more contiguous recorded lots under [14] common ownership," so using that rational[e] if an applicant comes to us and shows a large parcel of land and wishes to divide it into two pieces, they would not require subdivision suitability, but if they were to divide it into three pieces, then it would require a subdivision suitability. If they came to us one at a time, then at the point where they came in for the third dwelling, we would say you need the subdivision suitability.

Q I understand. Very good. So if the person claiming ownership of this land were to have approached you during the time period we're talking about, when I say you, I mean the ISDS section, attempting to market, develop and market these parcels in that time frame, he or she would not have gotten past the second lot, in essence, without undergoing suitability determination?

A That's correct.

Q Okay. Assuming that the area that is platted here is coastal marsh and assuming that it is frequently inundated by the tide at high tide, and assuming further that one would have to bring in fill material in order to develop this [15] property at all, or this area at all, and assuming the

use of clean bank gravel to a height above two feet above the watertable and assuming conventional engineering and design of septic systems as available at that time, in 1983 what would be the consequences of a subdivision suitability application and what would be the consequences of the individual lot applications?

A Well, first of all, I'd say that in order to really properly assess the feasibility and approvability under the regulations of installing and operating septic systems on 74 of these lots, you know, the applicant would first have to demonstrate compliance with the regulations, and, as you stated in your question, there are quite a few pieces of information that would have to be submitted, and each standard of the regulation has to be evaluated with respect to the actual conditions on the site. Typical items that would be looked at would be, in terms of site suitability, is does the site have two to four feet of dry soil above the watertable which would allow design and construction of a septic system, is there a 50-foot horizontal separation distance [16] to any wetland, is there adequate land area on each lot to site a septic system in compliance with the sizing requirements given by the rule. I mean, these would be the factors that would be evaluated during the permitting process.

Q With respect to allowance of systems within 50 feet of a wetland, based upon horizontal measurement can one deviate from that by variance?

A It is possible under the rules to request a variance or a waiver from that requirement, provided that the applicant can demonstrate that the public health and the environment will be protected.

MR. RUBIN; Do you have of [sic] the '83 application materials.

MR. GOLDMAN: It's right in front of you, Mike.

Q Would the information that I just gave you in my hypothetical have been sufficient for you to make an evaluation for, and if not, what further information would you need?

A Well, clearly I need a plan that would show various pieces of information as required by the [17] rule on the plan so we could get a clear picture of what the physical characteristics were of the site and characteristics of the proposal. In addition to that, there would be information shown on that, on that plan that would indicate the locations of certain testing work, such as percolation testing, watertable depth and so forth; if it's not directly in the plan, it would be referenced to other documents that contain that information, so these are critical pieces of information that must be submitted.

Q So, based on what I told you, would you be able to reach a conclusion, any conclusion at all as to the likelihood of an acceptance or a rejection?

A Like I said, I think you need to go through an application process in order to determine the acceptability, or the unacceptability of that proposal.

Q Okay. If somebody were to construct with septic tanks of a conventional type on 74 of the lots shown there—

MR. WEBSTER: Septic tanks or ISDSs?

Q ISDS systems, and excluding the parcels 74, 73, [18] 1, 2, 15, 16, and if one were to construct such an ISDS system on each of those other parcels, and if there are 74 such other parcels and if such septic systems were for a conventional design prevalent at that time and if such septic systems were to be constructed in an area to be filled with clean bank-run gravel to an elevation of 6.5 feet above the mean high tide line, and if, of course, accompanying

residences to take advantage of those systems were to be constructed and if we were to assume a conventional three-bedroom residence accompanying each system, what would be the effects of such construction at the wetland edge, or at the edge of Winnapaug Pond?

A Well, I couldn't say, you know, with preciseness what the effect would be without specific information concerning exact distances between septic systems and the water bodies; exact design information for, exact design information concerning each of the septic systems. I would have concerns about development at that density on a parcel like this based on the limited knowledge I have of the area. We have undertaken [19] other permitting activities in the Winnapaug area, but we have evaluated or looked at issues such as the distance, such as the distance from the septic system to the ponds, and one of the primary concerns in this particular area is the nitrate loadings to the pond.

Q Go on.

A So, you know, we would have concerns concerning nitrate loading and we would have concerns with respect to, from a public health perspective, ensuring that the waste is properly treated before reaching any water bodies.

Q And do you have any estimates, however qualified, as to the level of nitrate discharge that you would realize into the water body from the hypothetical that I described based on this plat?

A No. Based on my experience with nitrate impacts, there would be a significant increase in the nitrogen loadings to the groundwater over typical background levels.

Q And are you able to quantify that?

A I'm not able to exactly quantify that at this point, but a rough estimate in the order of 20 to 30 milligrams per liter, it's possible with this [20] kind of density.

* * *

[Held June 18-26, 1997]

TRANSCRIPT OF PROCEEDINGS

[Caption omitted in printing]

* * *

APPEARANCES:

John B. Webster, Esq ..... Counsel for the Plaintiff
Patricia J. Petrella, Esq ..... Counsel for the Plaintiff
Michael Rubin, Esq ..... Counsel for the State
Brian Goldman, Esq ..... Counsel for CRMC

* * *

[1:1]

WEDNESDAY, JUNE 18, 1997

* * *

[1:12]

[MR. WEBSTER:] You need fill for an ISDS, you need fill to be able to construct homes. But do you do anything else with it? The property is indeed a coastal wetland, you Honor. It is on a barrier beach. We take no issue with that. I'm not even going to take issue with the environmental consequences that will occur as a result of our development.

* * *

[1:44]

ANTHONY PALAZZOLO, Having first been duly sworn, testified as follows:

* * *

[1:63]

EXAMINATION BY MR. WEBSTER

* * *

[1:71]

Q Who has paid the taxes on this property since 1959?

A I have.

THURSDAY, JUNE 19, 1997

* * *

[1:73]

CROSS-EXAMINATION BY MR. RUBIN

* * *

[1:74]

Q And what they refused you was the same thing, essentially, that you went to the Coastal Council with in 1983?

A Correct.

Q And you say that what the Coastal Council did [1:75] constituted a taking of your property?

A Well, I think that's a—I feel that since they didn't let me use it, I paid for it. I paid taxes on it. I feel that I had a right to use it, providing it caused no harm.

Q In any event, that's what your lawyer is alleging in this case; correct?

A Correct.

Q Okay. But that's the same thing that happened to you back in 1970, isn't it?

A Correct.

Q Okay. So what happened to you back in 1970, that was a taking of your property, too, wasn't it?

MR. WEBSTER: I'm going to object, your Honor.

A That has to be—I don't understand that.

THE COURT: Why?

MR. WEBSTER: The basis of my objection? I think, and I appreciate my brother's skills of advocacy, but we all know the *Williamson Doctrine*. He's argued it here. You have to keep applying.

THE COURT: Sustained. It's calling for a legal conclusion anyway.

* * *

[1:141]

GROVER JOHN FUGATE, having first been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. RUBIN

* * *

[1:144]

Q Tell me what the 1983 application was for.

A A review of the records shows that the '83 application was for a filling of a coastal salt marsh and filling below the mean high water mark onto the State property for ostensibly to slow erosion. There was no other uses applied for.

Q And how is the area described with reference to the mean high tide line?

A The area that the proposed filling was to occur covered extensive areas of the salt marsh, and also extended

beyond the salt marsh outward to a bulkhead line that was to be established out in Winnapaug Pond and filling of that area below the mean high water mark.

Q What does the application itself say with reference to [1:145] the mean high tide line?

A The application indicates that there will be a filling of about—of approximate elevations, 6.5, above the mean low water mark, and which would translate to five feet above the mean high water mark. Existing elevations range from zero to five feet mean high water, with marsh elevations of zero to two feet mean high water.

Q What does the initial application say with respect to the mean high tide line in the area where the marsh meets the open water?

A The application proposes to fill that area up to an elevation of approximately five feet mean high water. It creates a new mean high water mark out in the pond out to a bulkhead line that would be established as part of this application.

Q So from the face of the application itself, what can you determine about what was intended with respect to areas below mean high water?

A There was an intent to fill below mean high water and create an upland area out of what was formerly state property.

Q Now, can you describe that application in terms of its specificity, in terms of its purpose?

A The application is extremely vague in terms of its [1:146] engineering requirements, in terms of the application itself, in terms of the potential uses that might be to the property. It merely says that they want to fill this area for erosion control.

Q What kind of engineering went into that application?

A Well, the engineering itself, there is some rudimentary diagrams which show some various sketchy details of the bulkhead. Basically, it looks like a plat map or maybe an old previous engineered plan of the area showing the area to be filled with very little engineering detail on the actual wall construction, fill profiles, existing contours, existing coastal resources, wetland edges. All this stuff is—

Q Let me stop you. The things that you just enumerated—go on. Maybe I shouldn't have stopped you. What were you going to say? All that stuff is—

A All that material is typically required for applications.

Q And to what extent is it present on this application?

A It's nonexistent.

Q Okay. What about grading plans?

A There are none.

Q Okay.

A There is no revegetation plans. I mean, I can go through the provisions of the plan and indicate [1:147] typically where we would get this type of information. The application will have to address Sections 120 if they are requesting variances from the standards. And there is a series of burdens of proof that they would have to meet.

If there is a special exception request, they would have to document the nature of the special exception and how they felt they met the burden of proof. If there were —this application would require variances under Section 140, which is the setback provisions. It would also require variances under Section 150 of the buffer provisions, and it would also have to address the policy

concerns under 200.2, which is for activities adjacent to Type II waters.

It would have to address policy concerns for 210.2, which is the barrier section. It would also have to address the policy sections for 210.3, which is the salt marsh provisions. And it would also have to address 300.1, which is the general category of beach requirements that all applications are required to address for a category of the applications. 300.2, 300.3 for the—300.2 is for the filling, grading, removing of the coastal features. 300.3, well—300.7, sorry, for structural shoreline protection. And 310 for the filling of intertidal waters.

[1:148]

Q That's 300.10?

A Yes, it is.

Q Okay. Now, when you say "address," what do you mean by address?

A Well, the applicant, there are certain burdens and standards, certain engineering requirements that have to be met in certain sections, and they have to explain how the application meets those policy concerns. And if it has not met them, how they would mitigate and deal with the issues that come out of those policy issues.

Q Based upon that administrative record, would the CRMC have known what he wanted to do?

A Based on the administrative record, the Council just had a vague notion that Mr. Palazzolo wanted to fill the area. In fact, the Council tried to elicit on cross-examination Mr. Palazzolo's intent. And I have the transcript from an '83 hearing here. They were—a question was asked of Mr. Palazzolo what he intended to do with this, and he said, "I can honestly say I've spent twenty years trying to

get to the first stage, meaning the filling of the area, and that I haven't given serious thought to the second stage."

Q That's fine. We went over some of that testimony this morning. But aside from that transcript, was there any other source from which the Council, or what other [1:149] sources would the Council have been able to define what Mr. Palazzolo intended to do here?

A In his application it's supposed to address what he intends to do and all the applicable standards and policy concerns under those sections.

Q And to recapitulate, that was not done?

A That was not done. In fact, if one is to read a—I'll just—under the findings of fact here, this is number three, and the decision that was issued on the '83 application. "Drawings submitted and on file in this office are vague and inadequate for a project of this size and nature. This fact was brought to the applicant's attention prior to the hearing and has not been addressed by the applicant. As a result, the property lines are vague and not specific." And then it goes on to address other concerns.

Q Okay. What evidence is there in that administrative record indicating he wanted to build a subdivision?

A None that I can see.

MR. RUBIN: Just for the record, we saved some time and agreed that exhibit number J would come in full. That's Mr. Fugate's CV.

Q And excuse me for belaboring this because it's important, but what evidence is there in that application that he wanted any of the following things: [1:150] 74 dwellings, 74 ISDS systems, or that he wanted to build homes at all?

A There is no evidence indicating in this application that that was requested by the applicant. In fact, the applicant, in presenting testimony, was pretty vague about the description other than he just wanted to fill the property because that was his right to fill the property. That he had no plans beyond that.

THE COURT: Is there a requirement, Mr. Fugate, that someone going in for filling indicate what they intend to do with it?

THE WITNESS: Yes, your Honor. Under 300.1, they have to describe the need for the project and what—I can actually read from the program here.

THE COURT: Is this from the regulations then in existence?

THE WITNESS: Yes, it is. It's 300.1, Category B, Requirements. "Describe the need for the proposal activity or alteration." And then you have to go on and describe also along with that a series of other requirements to demonstrate that all applicable zoning ordinances, building codes, flood hazards, all safety and fire codes and environmental requirements will be met.

THE COURT: But he already indicated that his [1:151] purpose, from what you've been able to giean from this, was to prevent erosion.

THE WITNESS: The application went far beyond erosion control. The application was for the filling of tidal waters, which was far beyond what is necessary for erosion control. In addition, both staff reports and the Council's findings indicate, and being familiar with the site myself, there is a very low erosion concern with this property at all. So that would raise a flag to the Council as to what the nature of this application was for. Certainly, the amount of fill that was being brought on the

property would not warrant erosion control. Six feet of fill is not necessarily for erosion control.

Q If he had applied for CRMC's assent to a subdivision development of residential homes, would you have considered that—to what extent would you have considered that application without perk tests, for instance?

A If this was for a subdivision, either that or a residential dwelling, this application, as presently presented, could not be accepted by the Council because it's deficient in prerequisite applications. Prerequisite permits, I should say.

Q Would you have even held hearings on it?

[1:152]

A No. It should not have gone to hearing if it was for a residential structure or subdivision because there were prerequisite permits missing.

Q Tell us about those prerequisite permits.

A One of the prerequisite permits is indicated in 300.3 and 320, is if the application involves the installation of ISDS's, which are individual sewer disposal systems, requires that those permits be obtained and be part of the application. If freshwater wetlands is to be filled or there is contiguous freshwater wetlands, those permits will also have to be obtained.

As part of the filling of the submerged lands, an Army Corps permit for that is a prerequisite. That's an Army Corps permit under Section 10 and 404, which would also invoke the State's 401 certification during that process, and the ISDS would also trigger the 401 water quality certification.

Q What about the EPA?

A EPA, the National Range Fishery Service, Federal Fish and Wildlife. There are five agencies that sit down to review 404 permits. The EPA has a veto provision on 404 for wetland filling situations that they can exercise. So they are part of the review process when a 404 permit is applied for, and they can potentially veto that permit.

[1:153]

Q I want to put you in the setting of 1983. What were the requirements at that time?

A For this, those were the requirements.

Q Those were the requirements, okay.

MR. WEBSTER: Objection. Could we just lay a foundation for that? I'm a little confused exactly where because he wasn't even program director. And I want to make sure he knows what all of the program requirements were.

Q To what extent do you have familiarity with the program requirements of these other agencies as they were constituted in 1983?

A I'm familiar with the requirements of the Clean Water Act as it related to the program and the Army Corps program. The Army Corps program Section 10 permits have been required ever since the 1800's. When the Harbors and Rivers Act came into effect, it was delegated to the Army Corps.

The EPA 404 and 401 are part of the 1971 Clean Water Act, so they were present at the time when the Clean Water Act was adopted. This was part of the program requirements. In fact, it was required in the federal statute to implement the Clean Water Act as part of our regulatory requirements.

Q And so the testimony that you gave a few moments ago [1:154] with respect to the pre-program requirements was testimony that you understood to be in response to an inquiry with respect to 1983?

MR. WEBSTER: Objection. I withdraw my objection, Mike.

MR. RUBIN: Okay, thank you.

Q I just want the record to be clear.

A Yes.

Q Okay, very good. If in 1983 an applicant had come to the Coastal program seeking permission to develop residences, and if that particular design, that particular plan had already been rejected by the ISDS section of DEM and that rejection still stood, what would have been the response of the Coastal Council?

A They would not have accepted the application.

Q Would it have—to what extent would it have been possible for an applicant in 1983 to obtain CRMC assent to fill an area, then go to the ISDS section and get septic permits, and then commence building?

A It wasn't done. The Council application process requires that they have a prerequisite permit; i.e., the ISDS permit has to be in place prior to the acceptance of an application for residence or a residential subdivision.

* * *

[1:174]

Q Okay. Let me ask you a basic question. The area in [1:175] question in this particular case, is there any upland in that area?

MR. WEBSTER: I object to form. As of when?

Q Well, let's say as of now.

A There is upland portions to the site, and there was at the time of the application based on aerial photo analysis.

Q What do you mean by upland?

A That portion of area above the mean high water mark is usually substantially dry, except for extreme coastal storms.

Q Now, I'm familiar with zoning practice, and I know the terms of variance and special exception with respect to zoning practice. Do those two words have the same meaning?

A I think they are probably reverse.

Q At the Coastal Council they are reversed?

A I think in terms of burdens, a special exception is a tougher burden to meet than a variance.

Q At the Coastal Council?

A At the Coastal Council.

Q But in general zoning practice, it's the opposite?

A I believe so.

Q Okay. With respect to the development of the upland portions of the parcel, or the area in question in this [1:176] case, which of those standards would have applied in 1983 with respect to the plaintiff?

A For the upland portions, it's a variance.

Q And how about in 1985?

A Again, in 1985 the plan did not change. It would have been a variance.

Q It would be a variance today as a matter of fact, right?

A That's correct.

Q Did Mr. Palazzolo ever submit a plan that was restricted to the upland portions of the property of the area?

A There was no record of such a plan.

Q Ever?

A Ever.

Q Do the upland portions of the area in question in this case contain or comprise sufficient square footage such that one could fit the footprint of a house?

A Provided that a septic system of suitable design, yes, I think you could probably fit a residential structure on that site.

Q But that was never applied for?

A No.

Q Oh, I've heard a lot about the need for a public purpose or a compelling public purpose from Mr. Webster. To what extent does that standard apply to a variance?

A It doesn't apply to a variance. It applies to a special [1:177] exception.

* * *

[1:182]

Q Could you be kind enough to compare those applications with the applications that were submitted to you?

A The applications, there were three applications that were submitted from what we can tell from the record. The first two applications are essentially the same as the '83 application. One small difference, with a second application that was filled in that there are channels that were to

be cut into the property and that the dredge material would be deposited.

But if you are to look at the boundaries, the bulkhead construction, the platting that existed in the '83 and the earlier applications, the '60's, '63, I believe they are essentially the same. And the lateral one is essentially—rough description of the '85 [1:183] application and one in '66.

* * *

[2:197]

FRIDAY, JUNE 20, 1997

* * *

CONTINUED CROSS-EXAMINATION
BY MR. WEBSTER

* * *

[2:201]

Q Now, once again I want to bring you back to standing at the gate.

A Yes.

Q If we look off to the right,—

A Right.

Q —what do you see there?

A There are two homes.

Q Did you take a look at those homes when you were out there?

A Briefly.

Q Okay. Are they on fill?

A They are on upland area, old fill.

Q But it was filled?

A It was filled.

* * *

[2:222]

Q Okay. So for him to do anything with the property, he's got to go to CRMC and say, my private use of this property is now irrelevant because I wanted to use—I have to use it to serve a compelling public purpose to benefit the community; isn't that right?

A The prohibited activities are there to safeguard for spill-over effects and to adjacent coastal areas wherever prohibited.

Q I understand. We agree that it's prohibited for him to fill this coastal feature; correct?

A Under the plan it is, yes.

Q Well, under the program?

A Yes.

Q Okay. So for him to do anything, he needs a special exception?

A To fill the wetland, yes.

Q Okay. To do that, he has to demonstrate that whatever he does with it will serve a compelling public purpose?

A That's a burden he has to demonstrate before the [2:223] Council.

Q Further, the activity must be one or more of the following: An activity associated with public infrastructure, such as

utility entity communications and transportation facilities; isn't that right?

A Yes.

Q We've already decided that housing is not deemed to be a compelling public purpose, have we not, Mr. Fugate?

A No. But road systems are.

Q Well, you say no. Didn't CRMC recently rule that housing, even public housing, does not serve a compelling public purpose?

A Correct.

Q You folks have ruled as a matter of law or problematic [sic] requirements that housing in and of itself doesn't serve a compelling public purpose?

A Correct.

Q And the only way he can put houses on his property is to serve a compelling public purpose; correct?

A Correct.

Q And the other use is a public beach, a beach club; correct?

A That's what you are saying under the zoning ordinance. There may be other uses permitted under the program.

Q I've asked you to assume that, but if that is correct, [2:224] he would also need to demonstrate a compelling public purpose; correct?

A For the filling of marsh.

Q Right. And there is no doubt in 1995 you knew he wanted to put a beach club there?

A '85.

Q I'm sorry, '85. There was no confusion about what he wanted then, did he?

A He indicated, yes, he wanted to put a public beach, I mean a private beach facility.

Q A beach club, right?

A Yes.

Q And he was going to have port-a-johns and some pavement, and some fill, right?

A Yes.

Q And the Council denied that because, in the Council's opinion, according to the record, a beach club didn't serve a compelling public purpose either?

A A private beach club; correct, for the filling of wetland.

* * *

[2:237]

Q Okay. To your knowledge, has the State condemned any property existing uses; a house, a business, an ISDS system, in the area adjacent to my client's property?

A To my knowledge, no.

Q No one has in the State of Rhode Island done that, have they?

A To my knowledge, no.

Q Now, you mentioned the Carr house, and we agree that the Carr's house is on fill; correct?

A It's on a deposit, yes.

Q All right. And we know that that house was built when, sir?

A There was a structure that was—existed prior in the '50's that was taken out by Hurricane Carol in 1954. It was a subsequent structure that was reconstructed in the 1960's, and that structure then was moved onto piles [2:238] and shifted off as foundation to the new piles somewhere around 1985. '84, '85, I believe, could be '86.

Q The house was originally built prior to the existence of CRMC?

A Yes.

* * *

[2:247]

Q And for me to be able to put fill in there, I have to prove that this house is going to serve a compelling public purpose?

A If they meet the burdens under 130.

Q And we agree that not only under the regulations themselves, but Coastal has already made a decision that housing does not serve a compelling public purpose; correct?

A Correct.

Q And we also agree that Council has ruled that a beach club doesn't serve a compelling public purpose?

A That particular proposal, that's correct.

* * *

[2:335]

DAVID F. TWOMBLY, Having been duly sworn, testified as follows:

* * *

[3:350]

TUESDAY, JUNE 24, 1997

* * *

[3:358]

CROSS-EXAMINATION BY MR. RUBIN

Q Mr. Twombly, your expertise doesn't extend to giving opinions as legal title, does it?

A No. Certainly, I'm not an attorney.

Q Okay. And you referred to the area in question as [3:359] Mr. Palazzolo's property at several times during your examination. You were using that phrase broadly; correct?

A Yes. Actually, title is held with the Shore Gardens, Inc.

Q And indeed, you are not really in a position today to give us a legal opinion as to whether it's even with Shore Gardens, Inc; is that correct?

A From the legal title opinion, no.

Q Okay. And, in fact, in your search of the land records, as you testified that you did, over my objection on direct, you encountered a deed from a Shore Gardens, Inc. to a Shore Gardens, Inc.; correct?

A That's correct.

Q Okay. So, insofar as your search of the title might have revealed, there are two Shore Gardens, Inc.; correct?

A I don't know, as I've made that assumption. It was basically a deed, a quitclaim deed, claiming or transferring whatever rights one entity had to another.

* * *

[3:361]

Q Okay. Now, at or around that time, Shore Gardens, Inc. made some deeds out; correct?

A Yes. There were a series of transfers that were dated 1959, '60, and one in '61.

Q Okay. And, for instance, there was a transfer out to Garofalo; correct?

A Yes.

Q December 3rd, '59. There was a transfer out to Mr. Urso, also December 3rd, '59; correct?

A The transfer to Urso was December 3rd, '59. My notes indicate that the Garofalo transfer was December 31st of '59.

Q Was that December 31st?

A Yes.

Q Okay. Maybe my notes are in error. In any event, they deeded one lot; Shore Gardens, Inc., the entity, deeded one lot to Mr. Urso; correct?

A That's correct.

Q And then deeded one lot to Mr. Garofalo; correct?

A Yes.

Q And then deeded one lot to Mr. Gencarella; correct?

A Yes.

Q My notes show December 4th, 1959.

A I show July 6th, 1960.

[3:362]

Q That might have been a record date, though?

A Yeah. I have the separate record dates for these as well.

Q Okay.

A I'm giving you the actual date on the deed.

Q Okay, very well. And then there was a deed to somebody by the name of Serra, S-E-R-R-A; correct?

A That's correct.

Q Right? And that was around June 1st, 1960?

A That's the date I have, yes.

Q Okay. And then in September 8th, 1960, a deed to Levcowich was recorded; correct, Book 80, page 318?

A September 8th is a recording date. The date of the deed was August 6th, '59.

Q And in fact you might know that's the former town clerk in Westerly.

A I do not know that.

Q Okay, very well. And then Shore Gardens, Inc. also deeded some lots to two gentlemen by the name of Algiere; isn't that correct?

A That's correct. That's right.

Q Okay. And you can correct my spelling, but for the stenographer's benefit I think it's A-L-G-I-E-R-E?

A That's correct.

Q Okay. Presumably, Shore Gardens, Inc. received value [3:363] with respect to each of those transfers; correct?

A I would presume so, yes.

Q And indeed those lots have been put to valuable use; correct?

A I would actually have to refer to the tax records or to the recent aerial photos to verify that.

Q Okay. But your testimony was that certain neighboring properties were used in a single family residential home fashion; correct?

A That's correct.

Q And it would be possible, would it not, that some of those properties that you are referring to as being used in that fashion are in fact the very properties that we've just referred to as having been deeded?

A I'm sorry, could you ask that again?

Q Okay. It very well could be that the properties that are in fact being used in the neighborhood for single family residential homes are the properties which we've just referred to in enumerating the deeds; correct?

MR. WEBSTER: Your Honor, I'll object to the question.

THE COURT: The form is a little troubling to me.

MR. RUBIN: I'll withdraw it.

MR. WEBSTER: And also, to make it easy, I will stipulate that some of those properties were in fact [3:364] —I don't believe all of them are, but I really don't know. But I believe some of them were. If that stipulation could save some time.

MR. RUBIN: I believe it does.

MR. WEBSTER: If you know the number, I'll stipulate to the number. I just don't know how many were built upon. Three of four at least.

* * *

[4:463]

WEDNESDAY, JUNE 25, 1997

* * *

[4:493]

DAVID S. REIS, Having first been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. RUBIN

* * *

[4:496]

Q And can you describe the natural resource values of Winnapaug Pond?

A The natural resource values of wetlands are—have been broken out into common areas. And, in terms of those common areas, the ones that I would associate with Winnapaug Pond, it would be fish and wildlife habitat values. There would be sediment and pollutant removal abilities within Winnapaug Pond. There would be nutrient removal abilities of wetlands within Winnapaug Pond.

The wetlands of Winnapaug Pond would provide production exported, export, which is the—basically photosynthesis providing plant matter which enters the pond to begin the food web. The wetlands within Winnapaug Pond provide sediment and stable and shore mechanisms, and they provide for recreation.

Q What kind of habitat is provided by Winnapaug Pond?

A Well, there are various types of habitat. There is the open water habitat, which provides habitat for fish, including, I guess, there are 39 species documented within Winnapaug Pond. It provides habitat for waterfowl and for various shore birds, and also for other types of birds such as king fishers and that type of thing.

Q What about agriculture in Winnapaug Pond? Can you tell [4:497] us about that?

A There are permitted agricultural activities within Winnapaug Pond.

Q Shellfish?

A The agriculture activity currently occurring, there is a shellfish production activity.

Q And shellfish found in Winnapaug Pond would include such things as quahogs?

A It would include quahogs, soft shell clams, muscles [sic], scallops.

Q Okay. And what kind of species of fish would be found in Winnapaug Pond?

A Through surveys, DEM, Division of Fish and Wildlife, has provided reports to CRMC which document the existence of 39 species; such things from blue fish, to striped bass, tautog, pollack. Again, 39 species.

Q Flounder?

A Flounder is included in that list.

Q Do any of these species have commercial value?

A Yes, they do.

Q What about the species that don't have commercial value, what values do they have?

A Well, there are species that have commercial value, and normally the species that have commercial value are also of recreational importance. And the species that would [4:498] not be considered to either have commercial or

recreational importance are normally important as a food source for those species that do have commercial recreational importance.

Q Would the big fish eat the little fish?

A Pretty much, yes.

MR. WEBSTER: So stipulated, your Honor.

THE COURT: In life, too.

MR. WEBSTER: I'm sorry, Judge?

THE COURT: In life, too.

Q Can you make specific reference to the salt marshes in Winnapaug Pond and describe how they would contribute, if at all, to the habitat and survival of the species that you've just referred to?

A Yes. First of all, the salt marshes provide primary production. They provide nutrients and lock up organic carbon into plant matter which then provides the basis for the food chain for those fish right up from the hisser plants, phytyl plant, up to the smaller fish, and then of course the larger fish. They are very important habitat for a lot of the smaller food fish or for ink fish we call them, for those species, which are at the top of the food chain which provide commercial and recreational importance.

Q What other types of natural resource values do the salt [4:499] marshes bordering Winnapaug Pond provide?

A Again, I guess I mentioned those when I mentioned the values, natural resource values of Winnapaug Pond. But again they provide fish and wildlife habitat, and they perform various functions, okay. And I mentioned those functions such as sediment removal, pollutant removal, access and nutrient removal, and that type of thing.

Q Okay. Nutrient removal, why is that a good thing? I thought nutrients were good?

A Nutrients are good in the proper balance. But if nutrients become out of balance with the environment, they can cause significant problems.

Q And would those problems include eutrophication?

A Yes, it would.

Q Could you explain that briefly?

A Eutrophication is a condition where nutrients cause excess growth within the pond. Starting with the bottom of the food chain, normally you would have phytoplanting blooms. And those phytoplanting blooms would cause other problems such as decreased light penetration into the water column, which then would cause—would not allow plants at the bottom of the pond to receive enough light to survive. When one of those phytoplanting blooms pass, which they do, they are relatively short lived, that material within the water column would [4:500] settle to the bottom and decompose causing anoxia, which is a lack of oxygen. It would also change the bottom habitat type.

Q And what would that do the species that spawn or thrive in Winnapaug Pond?

A Well, the shellfish at the bottom of the pond, and many of the fish in the water column, would be killed during an anoxic event where the oxygen and the water level decreases to the point that it cannot sustain them.

Q Do all of the fish species that live in Winnapaug Pond stay in Winnapaug Pond?

A No, they do not.

Q Okay. Would they migrate out to the open ocean?

A Many of the species would migrate to the open ocean.

Q And among those species that might migrate, are there any commercial or recreational valuable species?

A Yes, there are.

Q Could you just give us one or two examples?

A Striped bass, blue fish, flounder, tautog, pollack.

Q The species that you just mentioned, which also live in the open waters of the ocean, can those species thrive and reproduce without locations such as Winnapaug Pond?

A The element of many of those species are dependent upon estuaries, such as Winnapaug Pond, for their early life stages where they can find adequate food and cover for [4:501] that period of their life.

Q How many acres was Mr. Palazzolo proposing to fill in 1983?

A I believe it was eighteen.

Q And what percentage of the total acreage of salt marsh bordering Winnapaug Pond would be lost to this one project?

A Twelve percent.

Q Do you have an opinion as an environmental scientist what would be the impact of losing twelve percent of the salt marsh habitat bordering Winnapaug Pond?

A I do.

Q And what is that opinion?

A Twelve percent of the loss of the salt marsh within an estuary such as Winnapaug Pond is a highly significant number. I believe losing twelve percent of the marsh

would result in the incremental loss in the productivity of the pond.

Q And that loss of productivity, I assume, would affect which of the values that you just had referred to in your testimony?

A Well, in terms of productivity, specifically I would be speaking of the—going right up the food chain from the plant matter that's produced by the salt marshes which provides food for small fish, phytoplankton, and [4:502] some of their earlier live forms of the larger fish.

Q With regard to your opinion that a twelve percent loss in salt marsh would have the impact that you described, are you aware of any studies that would support your conclusion?

A Yes. I found within CRMC's database a 1971 study that was performed by DEM Division of Fish and Wildlife. Back then it was the Division of Natural Resources. And they concluded that the loss of those eighteen acres would constitute a significant impact on the productivity of the pond.

Q Now, do you view each site in isolation, or do you take into account cumulative impact?

A We look at the individual aspects at each site and consider that. But we also normally take it a step beyond and have to look at the cumulative impact to the adjacent areas.

Q Now, did you consider any affects of the—let me stop there. Your testimony up to now with respect to the impact of Mr. Palazzolo's project has focused on what aspect of the proposed development of the site? Has it been just the fillings?

A The filling itself.

Q Okay. Above and beyond the filling itself, did you consider what impact 74 ISDS or septic systems would [4:503] have?

A I did perform some nutrient loading calculations.

Q Okay.

A As to the nature of that impact.

Q All right. And did you have occasion to look at the deposition of Russell Chateauneuf, hitherto marked as W1?

A No. I did not.

Q Okay. What figure did you use as the nutrient loading figure with respect to 74 septic systems?

MR. WEBSTER: I object to form.

MR. RUBIN: He can explain, your Honor.

THE COURT: Do you understand the question?

A I think he's looking for the nutrient loading factor. And in this case it would be the nitrogen loading factor. The nitrogen loading factor that I used was 38 milligrams per liter.

Q And how did you arrive at that?

A The loading factor of 38 milligrams per liter was taken from a review of the literature and appeared to be a mean value, and also in discussions between our office, CRMC, and DEM. It's a figure that the agencies, through the technical review committee, agree should be used for performing nitrogen loading calculations.

Q And what calculations did you perform on that figure?

[4:504]

A I performed a set of nitrogen loading calculations for this subdivision as proposed with 74 units over the area of the site, which I estimated at 24 acres.

Q And did you arrive at another figure as a result of that?

A Yes. Going through the calculations, I determined that the loading—the end loading factor through this analysis was approximately 22.4 milligrams.

Q And is that the method that you used a common practice for evaluating nitrogen loading from ISDS's?

A Yes. It's a fairly simple method. You look at the initial loading factor of 38 milligrams per liter, you look at the size of the site, and you look at the recharge to that site from precipitation and from the ISDS flow. And it's commonly utilized. It's utilized by CRMC and DEM staff for environmental evaluations and by other states.

Q Okay. And so that final figure that you mentioned was 22 milligrams per liter?

A Yes. 22.4.

Q 22.4?

A Correct.

Q How does that compare to the federal drinking water standard for ground water?

MR. WEBSTER: I object.

[4:505]

THE COURT: Why?

MR. WEBSTER: Foundation.

THE COURT: Do you know?

Q Are you familiar with the drinking water standards for ground water?

A Yes.

Q How does the figure you just gave us compare to the questioned federal drinking water standard for ground water?

A Ten milligrams per liter of nitrate is the federal drinking water standard for ground water.

Q So this is roughly two and a half times greater?

A Correct.

Q I'm going to show the witness W1.

MR. WEBSTER: Which is?

MR. RUBIN: Rush Chateauneuf's deposition.

Q And ask you to read pages nineteen through twenty of that deposition.

THE COURT: How are we getting this in through this man on someone else's deposition?

MR. RUBIN: He's going to compare the figure that he's using to the figure that Rush Chateauneuf gave.

THE COURT: Well, then ask it hypothetically. I wouldn't use someone else's deposition in these circumstances.

[4:506]

MR. RUBIN: It's actually testimony. But in any event,—

THE COURT: Either way.

Q I wanted to ask the witness if his figure of 22 grams was consistent with the figure Mr. Chateauneuf came up with.

THE COURT: Well, why don't you say that?

MR. RUBIN: All right.

Q If Mr. Chateauneuf came up with an estimate of nitrate discharge with respect to a particular project, this particular project, of twenty to thirty milligrams per liter, can you compare your estimate to that hypothetical estimate?

A Well, my estimate of 22.4 is within that realm.

Q Okay. And how would the nitrogen loadings that you've referred to affect the ecology of the area?

A Nitrate is a nutrient that's an essential nutrient for plant growth and for phytoplankton, and algae growth. But again, it needs to be provided in the proper balance. The concentration of nitrate, nitrogen, Winnapaug Pond is approximately—let me look up the number. I believe it's approximately .05 milligrams per liter as determined by the salt pond watchers, okay, and that's relatively low. We are talking about comparing 22.4 milligrams per liter to .05 milligrams per liter.

[4:507]

It's pretty apparent that that level of loading is highly in excess of what the system is used to, and that would—that high level of loading would cause the eutrophication in the pond and the symptoms that go along with that.

Q And would those effects just be concentrated in the immediate vicinity of Mr. Palazzolo's site?

A Normally you would expect some localized effects at the discharged location along the site boundary. But no, you would also expect those nitrates to spread throughout the pond to the circulation patterns within the pond and cause impact in other areas of the pond as well.

Q That 0.75 figure that you referred to, does that have a name or a particular place in the literature?

A Actually the 0.75 figure is another figure that's provided by one of our references that is used. It's a figure provided by Wetzel in a text entitled, 'Limnology.'

And, according to Wetzel, that's a concentration which causes the eutrophication in estuarial waters. Comparing 22.4 milligrams per liter to .75 milligrams per liter provided by Wetzel, it's approximately thirty times higher than Wetzel's figure.

Q Thirty times higher?

[4:508]

A Yes.

* * *

[4:511]

Q Okay. And can you tell us what an intertidal marsh is?

A An intertidal salt marsh is an area that is affected by the tide. All salt marshes are entire tidal [sic] salt marshes.

Q And has the legislature come up with a list of species that are coincident with intertidal salt marshes?

A Yes.

Q Okay. A list of species that are prima facie [sic] evidence of the existence of prima facia [sic] salt marsh?

MR. WEBSTER: I object and stipulate to the fact that this is an intertidal salt marsh. I thought we had already done that.

Q Did you look for those species on this site?

A I looked for species that would indicate where the mean high water mark and below was.

Q Okay. What species are consistent with locations below the mean high tide line?

[4:512]

A The primary species that is a very clear indicator of where the mean high water mark is, is spartina alterniflora. And that's the species I was looking for.

Q Why this spartina alterniflora? Maybe you can spell it for the stenographer.

A It's spartina, S-P-A-R-T-I-N-A, alterniflora, A-L-T-E-R-N-I-F-L-O-R-A.

Q Why is spartina alterniflora found in areas below the mean high tide line?

A That's the area where this particular plant is specifically adapted to, very specifically.

Q Did you find any of that plant on the site?

A Yes.

Q By the way, is that plant one of the plants that was listed by the legislature?

A Yes.

Q Okay. Now, you have in front of you T1; is that correct?

A Yes.

Q Okay. This is one of the items that Mr. Tait just testified to; correct?

A Correct.

Q Okay. Did you make any notes as to the location of spartina alterniflora on the day that you accompanied [4:513] the DOT survey crew?

A Yes. I had prepared an official map from an aerial photograph, okay, and then we went out to the site. And based on that map went to those specific areas and surveyed the elevations within a spartina alterniflora, and also tidal pool areas.

Q And did you find—did you map the areas of spartina alterniflora?

A Yes. I prepared a very rough map from an aerial photograph.

Q Okay. And did you keep notes of the locations where shots were taken and the correlating vegetation with respect to the location of those shots?

A Yes, I did.

Q Okay. Now, looking at T1, were any of those elevations listed, locations where you encountered spartina alterniflora?

A Yes.

Q And how are the locations where you have encountered—did you have occasion to review this map before this testimony today?

A Yes, I did.

Q Okay. And did you have occasion to make any—to observe the marking patterns on the map?

A Yes.

[4:514]

Q Okay. In fact, did you insist in enhancing some of those markings on the map?

A Yes.

Q Is there any special way in which locations with spartina alterniflora are designated on that map?

A Yes, there are. They are marked in green.

MR. RUBIN: Can I approach, your Honor?

Q Now, there has been some testimony by Dr. Spaulding that based on a—the meconic cycle, the current mean high tide line for the area in question would be measured—would be 1.70 NGVD. Can you compare the locations where you have found spartina alterniflora to the number 1.70 in terms of elevation?

A All the areas that I find spartina alterniflora, except for some places where I found the short form of spartina alterniflora, were at 1.7 or below.

Q So your—to what extent do your observations, your botanical observations, bear out 1.70 as the current mean high tide line for the area in question?

MR. WEBSTER: I object, your Honor. I know there is no foundation that's been laid for this question. Where I sense where he's going, he's trying to prove that because of the existence of this species of flora, that that's where the mean high water mark is, I think we all know.

[4:515]

THE COURT: Well, I think all you are going to get out of this man is that it's indigenous to just below the mean high water mark, right?

THE WITNESS: Correct.

* * *

[4:518]

CROSS-EXAMINATION BY MR. WEBS[redacted]

* * *

[4:521]

Q And you agree with me, would you not, that in order to receive a special exception, my client needed, in 1983 and in 1985, as well as today, he needed to demonstrate to the Board that his use of that property will serve a compelling public purpose?

A Correct.

* * *

[4:522]

Q Would you agree that under CRMC's program that housing does not serve a compelling public purpose?

A Yes.

Q As a matter of fact, CRMC has made such a ruling before that housing, in fact, public housing, doesn't serve a compelling public purpose?

A They have made that determination, yes.

Q Recently?

[4:523]

A Yes.

* * *

[4:532]

Q What do you mean by removing sediments?

A Sediments in the water column that get up into a salt marsh would normally settle out within the salt marsh and

be removed from the water column. It serves as a filtering mechanism.

Q Does that provide benefit to the public as a whole?

A I would say yes.

Q Would you also agree with me that my client's property is aesthetically pleasing?

A In my opinion, yes.

Q It's open, natural, provides a visual vista for beach people, a visual easement?

A I would agree that it's aesthetically pleasing, yes.

Q And that's one of the goals of CRMC, is to protect these —aesthetically protect the environment?

A It is part of the program, yes.

Q And we do that so the general public, the people in the State of Rhode Island, can come down and look at an area [4:533] that's as pretty as my client's?

A Correct.

Q So that everybody can enjoy the property that he owns; correct?

A Yes.

* * *

[4:577]

ALFRED G. THIBODEAU, Having first been duly sworn, testified as follows:

[4:578]

DIRECT EXAMINATION BY MR. RUBIN

Q You are an attorney, Mr. Thibodeau?

A Yes, I am.

Q Okay. And do you do title work?

A Yes, I do.

Q Okay. And do you—are you affiliated with any title insurance companies?

A I am authorized by, or actually I'm a policy writing agent for Commonwealth Title Lawyers Title and Money Guarantee. I'm a licensed attorney to provide certificates for all other major companies operating in Rhode Island.

MR. WEBSTER: Your Honor, I'll stipulate to Mr. Thibodeau's qualifications in the field of title examination.

THE COURT: All right.

MR. RUBIN: Very good.

Q And have you had occasion—an occasion to review the title of the site which is the subject of this Court action back to 1959?

A Yes, I have.

Q And insofar as record title is concerned, who is the owner of record?

A The unknown stockholders of Shore Gardens, Inc., a forfeited Rhode Island corporation, subject to the [4:579] claims of any creditors that might be out there.

Q And the property as, insofar as listed in the land evidence records of the Town of Westerly, shows the property in the name of whom?

A The corporation, Shore Gardens, Inc.

Q There has been testimony in this case that Mr. Palazzolo acquired title in 1959 by virtue of a deed from he and Mr.

Urso to Shore Gardens, Inc. Do you agree with that proposition?

A Yes.

Q Do you agree that the title went into Mr. Palazzolo at that time?

A Well, half interest on the property was conveyed to Mr. Palazzolo.

Q And then what happened?

A It was practically immediately conveyed by Mr. Palazzolo and the owner of the other half interest to the corporation, Shore Gardens, Inc.

Q And is that a transaction by which Mr. Palazzolo himself in his own individual capacity acquired title to the property?

A No. That's—that's the action whereby he divested his interests in the property and conveyed it to the corporation.

Q Okay.

[4:580]

MR. WEBSTER: Your Honor, my brother wants to take one of my letters and introduce them into evidence.

MR. RUBIN: Your Honor, this relates to the interrogatories. If I may explain, the interrogatories were answered sort of in a sequential form, and the culmination of the answers was this letter from Mr. Webster to me. It's UU. And I would like to have it admitted in full.

MR. WEBSTER: Just simply put, my brother had—was unclear of certain dates of acquisition, so I sent him a letter answering his question.

THE COURT: Any problem with your letter being full?

MR. WEBSTER: No. That's the first time I've ever had anything of mine introduced in evidence.

THE COURT: Maybe soon that will reach the value of Abraham Lincoln's correspondence. Full. Mr. Thibodeau, what would be required for this land to be conveyed to another party?

THE WITNESS: Standard practice in Rhode Island would require an action in Superior Court naming all of the parties in interest with service, either actual service or public service, at the discretion of the trier of fact or trial judge to get everybody before the Court and decide who the stockholders were, whether or [4:581] not there were any debts, and make a determination of who the stockholders were.

Q And wouldn't notice have to be given to the world?

THE COURT: Well, at least the Division of Taxation are going to want theirs.

* * *

[4:582]

Q All right. Now, whoever acquired title on the date of the transaction to Shore Gardens, Inc., which I believe is the third list of listed transactions, did such entity then proceed to deed out?

A Yes. If you look at the chain of title to the various lots in the subdivision, there is a series of conveyances where a total of eleven lots were sold out, five of which were then reconveyed to the corporation.

Q Okay. Let's get to that.

A The net result, there were six lots conveyed out.

Q Okay. And showing you a packet that consists of RR, QQ, OO, PP, SS, and I believe that's TT, can you confirm that those are certified copies of those deeds?

A Yes. Those are six deeds that were conveyances by Shore Gardens, Inc. to third parties of lots on this plat.

* * *

[4:584]

Q And I would just like you to briefly look at and identify Exhibit VV. Exhibit VV is a deed from Ernest Algiere and George Algiere to Shore Gardens, Inc. which has been recorded in Book 100 of page 524 and purports to convey five lots back to Shore Gardens. Okay. And the date on that is the 15th of May, '69?

[4:585]

A Correct.

* * *

CROSS-EXAMINATION BY MR. WEBSTER

* * *

[4:592]

THE COURT: This is all the more reason why Mr. Thibodeau would insist on an action to acquire title in view of two corporations that may not have been related, and a deed from Mr. Palazzolo thinking he was still a corporation, sending one deed from one Shore Gardens to another. When in fact that first one was dissolved and a second one perhaps having no relationship with him whatsoever was in existence. And this is a title examiner's nightmare. And that's why if I were a title company, I

wouldn't issue title one on this property unless there is an action to acquire title.

* * *

[4:593]

REDIRECT-EXAMINATION BY MR. RUBIN

Q If the stockholders of the second Shore Gardens, Inc. somehow acceded to title, when would their date of acquisition have been at the earliest?

A At the time of the forfeiture of the second corporation.

Q And wasn't that indeed a revocation in approximately 1969 or '78?

A The Secretary of State's Office shows it as a revocation on February 27, 1978.

Q Okay. And so that would be the date when such stockholders would have received title?

A Correct.

Q Okay. At the earliest?

[4:594]

A At the earliest.

Q Okay.

A Individually as individuals, yes.

Q And would such individuals, as the record now stands, have record title?

A No, they don't.

* * *

[4:632]

THURSDAY, JUNE 26, 1997

* * *

[4:661]

THOMAS S. ANDOLFO, Having first been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. RUBIN

* * *

[4:677]

Q Okay. And that would be what you would realize net of all of the costs and discount factors that you've testified to?

A They would be the implied value of the lot going through this particular scenario of development. So, when we look at the highest and best use analysis, when I talked about financially feasible uses, this would be one scheme that an appraiser would look at to test whether or not such a development would be financially feasibly [sic].

In my opinion, the net overall value of $55,000 when you are going to expend in excess of four million dollars in construction costs, would be a great folly [4:678] because there is too much risk involved for this type of development just to translate to a nominal $55,000 value. So what that tells me is that maybe there is another scheme of development that would translate into a high value for the property, other than a massive residential subdivision as we are proposing for the site.

Q I'll get to that in a moment. If one were not to take into account the parcels shown on what has been marked as FFF as 126, 125, 120, 119, 98, 97, 98, excuse me, 98, 97, 96, and 95, if those were eliminated from your evaluation,

how would that tip the balance between proceeds and costs?

A Well, I didn't do that analysis. But just looking at, you know, the lots that you are pointing out, I would probably say that most likely I would come up with a negative value if those were taken out.

Q And showing you that which has been marked EEE, and asking you as a separate and independent question, if you were to take out of your valuation or take out from the lots that are salable, the area formed by 143, 142, 141, 140 and 139, how would that affect the balance between proceeds and costs?

A Well, again, it would most likely lower value expectations. So, at 55,000, I don't know how much [4:679] lower I could go, but we would probably show that if those lots were eliminated, that, you know, this project would be totally infeasible due to the fact that there would not be sufficient value taken.

* * *

[4:681]

Q And how would that affect your ultimate conclusion as to value as to whether it would be a positive number or a negative number?

A Well, again, extending this off an additional two years, if we went from three years to five years, you are going to have, you know, more, more cost associated with bringing this particular development to completion. So therefore I would dare to say that you would have a significant negative number as opposed to a positive number, nominal positive number as we have here.

Q Did you hear Mr. Clarke testify this morning?

A Yes, sir.

Q Okay. Were you in the Courtroom?

A Yes.

Q Okay. Did you here him testify with respect to something that could be done notwithstanding the Coastal Resources Management Council permitting requirements in the vicinity of Lot 127?

A Yes.

Q Okay. Lot 127, as shown on EEE and FFF, okay. And did [4:682] you hear him testify with respect to the comparative infrastructure that would be needed to service such an isolated single family home?

A Yes.

Q Okay. Do you have any cost or valuation analysis with respect to February 18th, 1986 with respect to such a design?

A Yes.

Q Can you tell us what that is?

A In my conversations with Mr. Clarke, I asked him what it would cost to access that lot through the existing gravel road that is there. And he provided me with a total cost for road upgrade and engineering of $39,000. So looking back at February 18th, 1986, if we had one buildable lot on that site, what I would do is assign a $100,000 value to that particular lot minus out the cost of engineering that Mr. Clarke provided. And then I would also assign to the site a value for excess land area in the sense that, you know, instead of having one house lot now on, let's say an acre of land, we have one house lot on a parcel, which is essentially twenty acres in size.

So what I would do is provide a contributory value of the excess land in addition to the implied value of that single family house lot. And what I did was I [4:683] looked at essentially nineteen acres of excess land at $7,000 per acre, which translates into $133,000, and I added to that the cost or the value of that one site, taking into account the cost to upgrade. And that amounted to 61,000. So when we add the two up, I have a total value of $194,000. So in my opinion, if I could just continue.

Q Please do.

A Again, getting back to highest and best use analysis, when we look at financially feasible uses, here we have a fifty lot subdivision where the development costs are extraordinary. And there is a very, very high risk, that, you know, something could go wrong; maybe the market will change and that you won't sell off as many lots as you are anticipating. Altogether a value of just $55,000.

When going back to that same time period, you have the ability to utilize a site for just one house lot and extract from that particular parcel a higher value than doing something of this significance. So, it would be in my opinion as an appraiser that given the development costs of this particular subdivision, that I would not opt as that being a financially feasible use.

From my perspective, I would just look at it as one house lot on essentially a twenty acre parcel, and [4:684] assign a value as of February 18, 1986 of $104,000.

Q And I notice that in coming up with that $194,000 figure, insofar as you testified, you didn't mention that that lot in particular would be right on the pond. Did you factor that in, or—

A Well, again, based on my 1986 analysis for the subdivision, I gave the larger lots a value of $100,000.

* * *